IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1052

NELSON BUNKER HUNT and W. HERBERT HUNT,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Nelson Bunker Hunt and W. Herbert Hunt, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 23, 1974.

OPINION BELOW

The opinion of the Court of Appeals is reported at 505 F.2d 931 (5th Cir. 1974), and appears in the Appendix hereto at page 24a. The opinion of the United States District Court for the Northern District of Texas appears at 366 F.Supp. 172 and appears in the Appendix at page 1a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 23, 1974. On January 10, 1975, an order entered by Mr. Justice Powell extended petitioners time for filing this petition to February 21, 1975. This petition was timely filed within that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether demonstration of a possessory interest in property seized by police authorities is sufficient to create standing to challenge the illegal seizure.

2. Whether by its nature a possessory or proprietary interest in an item inherently includes a reasonable expectation of privacy in that item sufficient to confer upon a defendant standing to contest an unreasonable seizure without a further showing of expectation of secrecy.

3. Whether the prerequisites for standing to challenge an illegal search and seizure are identical to the criteria by which a warrantless search and seizure are measured.

4. Whether for purposes of "automatic standing" pursuant to *Jones* v. *United States,* 18 U.S.C. § 2511 (1)(a) is a possessory crime with respect to tape recordings containing information, the possession of which information is illegal.

5. Whether the Government can extend the time in which to note its appeal in a criminal case pursuant to 18 U.S.C. § 3731 by merely filing a *pro forma* motion for reconsideration in the District Court.

STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Title 18 U.S.C. § 3731:

Title 18 U.S.C. § 3731 is lengthy, and is contained in full in the Appendix at page 47a.

Title 18 U.S.C. § 2511(1)(a):

Title 18 U.S.C. § 2511, *et seq.*, is lengthy and reproduced in full in the Appendix at page 48a.

Title 18 U.S.C. § 2510(4):

> Section 2510. Definitions
>
> As used in this chapter—
>
> * * * *
>
> (4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

STATEMENT OF THE CASE

This matter involves a warrantless search and seizure of materials by a police officer who, according to his later testimony, did not secure a warrant because he suspected no crime. On January 16, 1970, a private detective named Jon Joseph Kelly, who was hired by petitioners to investigate massive embezzlements of their financial interests, was stopped in his automobile

by Officer George Taylor of the Richardson, Texas, Police Department. Taylor had been instructed when he reported to work that day to go out and conduct surveillance on a red Mustang, one of several cars which had been parked in a suburban neighborhood in the same general location on succeeding days. Taylor informed his superior that he was going to stop the car if anyone came for it, and inquire of him what it was he was up to. He indicated that although he was suspicious, he had no knowledge of any crime that this person had committed or may have committed.

After Taylor had the Mustang under surveillance for 30 to 40 minutes, a man later identified as Jon Joseph Kelly arrived and drove off in the Mustang. Taylor immediately went after Kelly. As Taylor pulled out of the driveway where he was hiding and onto the street, he turned on his red lights. The reason Taylor was going to stop Kelly at that time was simply that Taylor was curious. Both Taylor and Kelly testified that Kelly noticed Taylor's lights and pulled over to let him by. At that point, Taylor claims Kelly slow rolled a stop sign, which Kelly vehemently denied doing. Indeed, Taylor said when he stopped Kelly it was only his intention to question Kelly. Taylor agreed that Kelly made no effort to get away and that he had a valid driver's license.

Although Taylor's and Kelly's stories vary completely as to what was stated with regard to permission to search the car and what type of search was conducted, Taylor testified that he did search the car and he found a briefcase with a tape recorder and an FM radio inside. After he looked in the briefcase, he had no knowledge or belief of any specific crime

having been committed. Taylor then asked Kelly if he was a private investigator and Kelly replied that he was. Taylor asked if Kelly was out on a divorce case, and at that point, Kelly asked to see a lawyer. If Kelly had answered yes to being on a divorce case instead of asking for a lawyer, Taylor testified that he would have let him go. When Kelly asked for a lawyer, Taylor decided to take Kelly into custody for slow rolling a stop sign. Thus Taylor testified:

> When he told you he wanted to consult an attorney rather than answering he was on a divorce case you made up your mind at that point you were going to take him in rather than issue him a ticket?
>
> Yes, sir.
>
> So the attorney was the turning point, when he exercised his Sixth Amendment right and asked for a lawyer?
>
> Yes, sir.

Although Kelly's car was legally parked at that point, the police seized Kelly's car from the street and took it to the police station. Taylor did not remove the briefcase with the tape recorder from Kelly's car while the car was being transported because Taylor did not believe that the case or the car contained contraband. He stated that if he thought that there was contraband in the car he would have removed it and taken it in his car with him, but he saw nothing illegal about the recorder in the case.

After placing Kelly in the police interrogation room, Taylor received the keys for Kelly's car from another officer who informed Taylor that the car was locked in the lot adjacent to the station. Kelly was not read his rights up to that time and was not taken to

a magistrate or allowed to post the preset collateral. He was held in custody for five hours before being charged with the minor stop sign violation although the maximum sentence for the offense was only a fine with no jail sentence and a preset collateral schedule was in effect. During this illegal detention of Kelly, Taylor went out to conduct a second search of Kelly's car and seized the previously discovered tape recorder which belonged to the Hunts. When asked why he did not secure a search warrant to search Kelly's car when it was parked at the police station, Taylor answered:

> Well, I didn't feel that there was any need for a search warrant at that time, I mean, I still didn't know that the man committed anything wrong, what did I need a search warrant for?

Taylor stated that if he did have a belief as to a crime, he would have obtained a warrant. Taylor and his superior both testified that there was a magistrate available within a reasonable distance.

After the recorder, which belonged to the petitioners, was seized without cause or warrant from Kelly's locked car, Lt. Berleson of the Richardson police, removed the tape from the recorder. He then played the tape found in the seized tape recorder. At that time he did not know why Kelly had been arrested; he did not know of any crime to which the tape might relate; he did not know if the contents of the tape were illegally or legally obtained; and he made no effort to obtain a search warrant. The evidence thus seized led to an investigation which resulted in the indictment of the petitioners upon charges of wiretapping pursuant to 18 U.S.C. § 2511(1)(a), and under 18 U.S.C. § 2.

The uncontradicted testimony in the District Court upon the hearings of petitioners' Motion to Suppress established that the tape recorder from which the tape in question was taken and which was seized from the car parked next to the police station was the sole property of the defendants Nelson Bunker Hunt and W. Herbert Hunt. At the first hearing on this motion, W. J. Everett and Patrick McCann, two men who will be the key government witnesses against the petitioners should this case go to trial, testified concerning the ownership of the tapes and equipment seized, and the car that was searched. Everett testified that on January 16, 1970, he was president of Clyde A. Wilson and Associates Investigative Service in Houston, and that he was in charge of the investigation including the wiretap. Kelly monitored the tapes on the street and worked directly for Everett. McCann was the wiretapper in charge of purchasing, assembling and installing the equipment including the tapes and recorders. Everett stated that the Hunts, the petitioners herein, were billed for and paid for the recording equipment used and seized and for the rental of the seized car. Everett further testified neither he nor his firm owned that equipment. He stated that petitioners paid Kelly's and McCann's expenses and that they were acting as agents of the petitioners in renting the cars and in the use and possession of the equipment.

Patrick McCann testified that he was in the electronics manufacturing business. He stated that he purchased the tape recorders and manufactured the electronic equipment involved in the wiretap for the Hunts. McCann further related how he had gone out to survey the job to determine what equipment he would have to sell to the Hunts. He testified that he furnished his own capital to manufacture his products

and then sold them to the men who paid for them. When asked about the seized recorder and tape, McCann unequivocally stated that the equipment *"belonged to the Hunts"*. He further stated that the tapes made were turned over to the Hunts and that the red Mustang automobile which was seized on January 16, 1970, was rented by him and was paid for by the Hunts.[1]

It was the uncontradicted testimony of Everett and McCann that the District Court concluded:

> The uncontradicted evidence produced at the evidentiary hearings in this Court can lead only to the conclusion the Hunts owned, and thus had a proprietary interest in, the tape recorder and the tapes since they ultimately paid for both the tape recorder and the tapes. This proprietary interest is sufficient to give the Hunts standing to challenge the search and the evidence gathered thereby. (Appendix page 10a.)

The District Court further concluded that the search and seizure in question was illegal by virtue of the absence of a search warrant. (See Appendix page 19a.)

On December 14, 1973, the thirtieth day following the issuance of the District Court's order and the last

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[1] In a separate case, which took place after oral argument in the Court below, McCann stated further that "[T]he tapes and the equipment that were sold to the Hunts remained the property of the Hunts and would always, as far as I was concerned, because I never take back equipment." Additionally, he stated "And since I purchased the equipment, and I sold it to the Hunts, as far as I was concerned, it was their personal property." Evidence adduced from Kelley in that same proceeding further corroborated Everett's and McCann's statements that the tape and equipment were the property of the Hunts. A Motion to Supplement the Record with this newly acquired evidence was filed with the Court on November 26, 1974, but was denied summarily by the Court of Appeals on December 9, 1974.

day provided for an appeal pursuant to 18 U.S.C. § 3731, the government filed a petition in the District Court for reconsideration. (See Appendix, page 20a.) This motion did not present any new matters. The motion was summarily denied on December 18, 1974 (see Appendix XI, page 21a) and 28 days later on January 15, 1975, the government finally noted an appeal. (See Appendix VII, page 22a.) Accordingly, petitioners filed a Motion to Dismiss the Appeal in the Court of Appeals on the grounds that the appeal was not taken within the thirty days provided by 18 U.S.C. § 3731, nor was it an appeal from an order suppressing the evidence. This motion was denied on May 17, 1974.

On December 23, 1974, the Court of Appeals reversed the District Court, holding in essence that the Fourth Amendment operates to protect privacy and that in order to establish standing to contest a search or seizure, a defendant must be able to demonstrate an expectation of privacy in the thing or place searched regardless of any proprietary interest. This petition raises fundamental questions of the interpretation and relationship of the expectation of privacy to the Fourth Amendment and its meaning in matters of seizures as opposed to searches.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS AS TO THE PROPER PREREQUISITES FOR STANDING TO CHALLENGE AN ILLEGAL GOVERNMENTAL SEARCH AND SEIZURE.

The testimony in the United States District Court was uncontradicted and the District Court so found that the Hunts owned the seized tape and tape re-

corder. On the basis of a possessory interest in this property, the District Court found standing to challenge the illegal search and seizure. The Court of Appeals in considering the matter determined that even though the Hunts may have owned the items seized, that by virtue of the Hunts not having physical custody of those items and precise knowledge as to their nature they did not have a privacy interest in them. The Court of Appeals noted that "[i]n the absence of a demonstrable expectation of privacy in the tape recorders and tapes, defendants can have no standing to protest the search and seizure." (Appendix page 41a.) The reasoning of the Court below has the following practical and legal effects: first, the Court's opinion stands for the proposition that a proprietary interest in things seized does not of itself yield standing to contest an illegal seizure; second, by applying the "privacy" test in the manner described above, the Court below has equated the concept of "privacy" with that of "secrecy;" third, by applying the rigid tests described above, the Court of Appeals has confused the elements required to demonstrate standing with those used to constitutionally evaluate a warrantless search and seizure.

(A) Proprietary Interest Alone Grants Standing.

The Hunts maintain they have an inherent expectation of privacy by virtue of ownership of the tape recorders and tapes even assuming *arguendo* that there was no specific demonstration of expectation of privacy. Under rulings by this Court and other circuits a proprietary interest *per se* satisfies the requirements for standing.[2]

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[2] The Fifth Circuit itself in *United States* v. *Banks*, 465 F.2d 1235 (5th Cir. 1972), *cert. den.* 409 U.S. 1062, held that the defend-

This Court has long held that a possessory interest in things seized will yield standing to contest a search and seizure. *United States* v. *Jeffers,* 342 U.S. 48 (1951); *Jones* v. *United States,* 362 U.S. 267 (1960). The Fifth Circuit's ruling below is further inconsistent with the ruling of the United States Court of Appeals for the Fourth Circuit in *Patler* v. *Slayton,* 503 F.2d 472 (4th Cir. 1974). In that matter defendant Patler complained of the search of his father-in-law's farm from which some spent bullets belonging to the defendant were seized by the police. The Court held that Patler had standing to challenge the search in part because he demonstrated a possessory interest in the property searched. The Third Circuit in *United States* v. *West,* 453 F.2d 1351 (3rd Cir. 1972), stated, in reliance upon the rationale of *Simmons* v. *United States,* 390 U.S. 377 (1968), that a defendant has standing to contest the seizure of an item owned by him, 453 F.2d at 1356. See also *United States* v. *Moody,* 485 F.2d 531, 533 (3rd Cir. 1973). In *United States* v. *West,* 453 F.2d 1351 (3rd Cir. 1972), the Court of Appeals for the Third Circuit held that the defendant could assert a possessory interest in a shotgun for

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ant Banks had standing to object to the search and seizure of a printing press used to manufacture counterfeit currency which Banks had purchased directly with his own funds and which was seized from a co-conspirator's garage. In the *Banks* opinion the Court stated simply that Banks had standing because "Banks owned the seized equipment." 465 F.2d 1241. See also *Cassady* v. *United States,* 410 F.2d 379 (5th Cir. 1969). In the opinion below the Court sought to distinguish *Banks* saying that there was "in *Banks* no dispute as to the full measure of Banks' title to the press, nor any controversy as to his direct and enduring relationship to the machine." Appendix page 41a. The distinction thus made by the Court of Appeals is meaningless in view of the record below which shows unequivocably that the Hunts had full title and right to ownership in the tape and equipment seized.

purposes of standing even though he did not have dominion and control over the gun. Similarly, the Court of Appeals for the Second Circuit in *United States* v. *Birrell*, 470 F.2d 113 (2nd Cir., 1972), held that the defendant by virtue of ownership of records in question had standing to contest the search of those records which were in the custody of the police as the result of an unrelated matter.

The Ninth Circuit in *Lurie* v. *Oberhauser*, 431 F.2d 330 (9th Cir., 1970), held that where defendants at the police station all denied knowledge or ownership of a seized suitcase, they could not object to seizure of same as "the right to protection against unreasonable search and seizure is personal and a defendant in a criminal case who claims no proprietary interest in the seized property has no standing to object to its admission as evidence on Fourth Amendment grounds." 431 F.2d 333. See also *Ramirez* v. *United States*, 294 F.2d 277, 281 (9th Cir., 1961), and cases cited therein.[3]

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[3] Similarly, numerous other Ninth Circuit cases as well as cases from the United States Circuit Courts of Appeals of the District of Columbia, and Sixth and Tenth Circuits have held possessory interest in seized objects is sufficient to confer standing.

Ninth Circuit—*Boyle* v. *United States*, 395 F.2d 413 (9th Cir., 1968), *cert. den.* 393 U.S. 1089. See also *Parker* v. *United States*, 407 F.2d 540 (9th Cir. 1969); *United States* v. *Connor*, 450 F.2d 334 (9th Cir. 1971); *United States* v. *Wing*, 450 F.2d 806 (9th Cir. 1971), *cert. den.* 405 U.S. 994; *Azzaro* v. *Schneckloth*, 443 F.2d 1 (9th Cir. 1971); *Northern* v. *United States*, 458 F.2d 427 (9th Cir. 1972); *Jackson* v. *Official Representatives and Employees of Los Angeles Police Department*, 487 F.2d 885 (9th Cir. 1973).

District of Columbia Circuit—*Jeffers* v. *United States*, 187 F.2d 498 (D.C. Cir. 1950), *affirmed* 342 U.S. 48; *Accardo* v. *United States*, 247 F.2d 568 (D.C. Cir. 1957), *cert. den.* 355 U.S. 898; *Brandon* v. *United States*, 270 F.2d 311 (D.C. Cir., 1959), *cert. den.* 362 U.S. 943.

Sixth Circuit—*United States* v. *Thomas*, 342 F.2d 132, 134 (6th

In contrast to the cases cited from various circuits above, the Second Circuit has held similarly to the opinion below that a possessory interest *per se* will not establish standing absent a further affirmative showing of an expectation of privacy. See *United States* v. *Bozza,* 365 F.2d 206 (2nd Cir. 1966); *United States* v. *Sacco,* 436 F.2d 780 (2nd Cir., 1970), *cert. den.,* 404 U.S. 834; *United States* v. *Lopez,* 420 F.2d 313 (2nd Cir. 1969).

The question of whether a possessory interest alone in an item seized is sufficient to render a person "aggrieved" within the meaning of Rule 41, Federal Rules of Criminal Procedure, and thus as having the requisite standing has also been prevalent in numerous prosecutions under the Dyer Act, 18 U.S.C. § 2312. The question in these cases ordinarily arises where the defendant accused of stealing or transporting the automobile in question is not in the vicinity of the automobile when it is seized. The United States Courts of Appeals for the Ninth and Tenth Circuits have held that a thief who claims ownership of a stolen car in question has standing to challenge the search and seizure of the same. See *Cotton* v. *United States,* 371 F.2d 385 (9th Cir. 1967), *Simpson* v. *United States,* 346 F.2d 291 (10th Cir. 1965). Similarly, see *Glisson* v. *United States,* 406 F.2d 423 (5th Cir., 1969). See also *United States* v. *Graham,* 391 F.2d 439 (6th Cir. 1968) *cert. den. sub nom Tucker* v. *United States,* 390 U.S. 1035.

Cir., 1968), *cert. den.,* 382 U.S. 1855; *Cash* v. *Williams,* 455 F.2d 1227 (6th Cir. 1972), *cert. den.* 400 U.S. 995.

Tenth Circuit—*United States* v. *Twilligear,* 460 F.2d 79 (10th Cir. 1972); *Wilson* v. *United States,* 218 F.2d 754 (10th Cir. 1955); *Simpson* v. *United States,* 346 F.2d 291, 294 (10th Cir 1965).

Further, the Court below initially inquired into the nature of the possessory interest of the Hunts in the material seized. The Court appeared to conclude at Appendix page 39a that the private detectives involved were independent contractors rather than agents and that accordingly the Hunts' title to the materials seized was tenuous.[4] The application of agency-property concepts made by the Court below in determining the measure of property interest has been rejected by the United States Court of Appeals for the First Circuit in *Rosencranz* v. *United States,* 356 F.2d 310 (1st Cir. 1966). The Court noted in *Rosencranz* that "[w]while he was as absentee, reluctant, unknowledgeable, and uninterested an owner as may be imagined, he was still the only holder of legal title to the premises."

(B) The Right of Privacy Does Not Require An Expectation of Secrecy.

The Court of Appeals held that "[I]t is almost certainly true that property rights cannot support a Fourth Amendment claim in the absence of a reasonable expectation of privacy in the property involved." (Appendix page 34a) Petitioners do not contest this general principle of law in that they assert that a possessory or proprietary interest in things seized in and of itself entails an expectation of privacy in the item in that there will not be unreasonable governmental intrusion. However, the manner in which the Court

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[4] The Court however conditioned its discussion in this regard with the observation that the law of agency might not be totally relevant:

> Whatever title defendants may possess in the disputed evidence, we cannot help but reflect that this discussion of master and servant law and legal title has taken us very far from the substance of Fourth Amendment rights. (Appendix page 40a.)

below elucidated that general principle has the effect of requiring that the property owner have more than an inherent expectation against governmental intrusion but rather a demonstrable expectation of secrecy.

Petitioners respectfully assert that privacy may more properly be defined as the "right to be left alone" by government or others, and not as a state of secretiveness and a proprietary interest in itself gives rise to that right.

The United States Court of Appeals for the Second Circuit noted in *United States* v. *Cataldo,* 433 F.2d 38 (2nd Cir. 1970) *cert. den.* 401 U.S. 977, *reh. den.* 402 U.S. 934, the general rule that a possessory interest in seized papers entitles the owner to a reasonable expectation of privacy. The Tenth Circuit in *United States* v. *Goad,* 426 F.2d 86, 89 (10th Cir. 1970), also stated that an invasion of privacy exists when property in which the defendant claims a possessory interest is seized. The Second Circuit in *United States* v. *Mancusi,* 379 F.2d 897 (2nd Cir. 1967), affirmed *sub. nom. Mancusi* v. *De Forte,* 392 U.S. 364 (1968), held that the right of privacy existing in Mancusi's business papers was the right to be left alone by the government. That principle was approved and clearly defined by this Court in *Mancusi, supra,* 392 U.S. at 369:

> [I]t seems clear that if De Forte had occupied a "private" office in the union headquarters, and union records had been seized from his desk or filing cabinet in that office, he would have had standing. . . . In such a "private" office, De Forte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken

> except with his permission or that of his union superiors. It seems to us that the situation was not fundamentally changed because De Forte shared an office with union officers. De Forte still could reasonably expect that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. (citations omitted)

The language of the Court thus dispells the notion that "privacy" for standing purposes means or otherwise necessitates the need for "secrecy", for the existence of Mancusi's records was not secret and the records themselves were not guarded. Mancusi had nothing more than an expectation that his papers would be left alone, and it is that expectation which constitutes privacy. See also *Combs* v. *United States,* 408 U.S. 224 (1972).

The United States Court of Appeals for the First Circuit has also recognized this specific principle in *United States* v. *Micheli,* 487 F.2d 429 (1st Cir. 1973), where it noted that "the rudest of governmental intrusions into someone's private domain may occur by way of a search of a personal belonging which has been entrusted to a nearby hook or shelf." 487 F.2d at 481.

(C) The Elements Required To Demonstrate Standing Differ from Those Used To Evaluate a Warrantless Seizure.

The Court below indicated that its reading of *Brown* v. *United States,* 411 U.S. 223 (1973), prompted it to the conclusion that standing may be obtained by the proper allegation by a criminal defendant of any "legitimate interest" of any kind in premises searched or items seized. (Appendix page 38a) However, the

Court below exceeded the *Brown* ruling in holding that in order to demonstrate the legitimate interest petitioners must prove that the contested search or seizure was unreasonable by virtue of disturbing a reasonable expectation of privacy. (Appendix page 38a) The Court of Appeals has converted the normal process for establishing standing, by showing a legitimate interest, to a process of demonstrating success upon the merits. Thus the Court held:

> *Brown* concisely states the rule of standing in Fourth Amendment cases: defendants must demonstrate a "legitimate interest" of some kind in the premises searched or objects seized. That interest may or may not be founded on some common law proprietary interest; the decisive factor in determining whether a search or seizure is "reasonable" for Fourth Amendment purposes is whether the complaining party's reasonable expectations of privacy have been unreasonably disturbed. (Appendix page 38a)

The Court has accordingly taken the standard of expectation of privacy applicable to test the reasonableness of a search and made it a requirement for standing. See also *United States* v. *Bell,* 457 F.2d 1231 (5th Cir. 1972). Petitioners contend that the Court's approach, by which it has rendered consideration of standing and evaluation of the merits as identical, is in contrast to the rulings of other circuits which have treated the concepts as distinct.

The United States Court of Appeals for the Fourth Circuit held in *Patler* v. *Slayton,* 503 F.2d 472 (4th Cir. 1974), that Patler had standing to contest a search and seizure by virtue of a possessory interest in the property searched and the fact that the search was directed against him. Nevertheless, the Court noted,

"Having standing to raise the propriety of the search, Patler has, however, failed to demonstrate a reasonable expectation of privacy in the property actually searched." 503 F.2d at 478. The Court of Appeals thus very distinctly found the concepts of standing and review of the merits as different, and in so doing overruled the District Court which had initially confused the matter. See *Patler* v. *Slayton,* 353 F.Supp. 276 (E.D.Va. 1973). Similarly, the United States Court of Appeals for the Eighth Circuit in *Holloway* v. *Wolff,* 482 F.2d 110 (8th Cir. 1973), rejected a contention of the State defendant that Holloway lacked standing because of his inability to show an expectation of privacy in the premises in question which he had visited for a short time. For standing purposes the Court rejected this contention finding that Holloway had standing pursuant to the rule of *Jones* v. *United States,* 362 U.S. 257, and that a further demonstration of privacy was thus irrelevant to the standing question. The Court then went on to consider the merits of the search in separate parts of the opinion, its consideration being based upon several different doctrines of search and seizure law relevant to evaluating the merits. The United States Court of Appeals of the Ninth Circuit specifically noted this distinction which had been missed by the District Court therein, in *United States* v. *Wilson,* 472 F.2d 901 (9th Cir. 1972), cert. den. 414 U.S. 868.

II.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING A CRIMINAL DEFENDANT'S STANDING TO CONTEST AN UNREASONABLE SEARCH AND SEIZURE.

The decision below raises anew the continuing question of what are the prerequisites for a defendant to establish standing to protest an illegal search and seizure. The question raised with respect to standing conferred by proprietary interests in things seized is, in the words of the Court below, "troublesome." (Appendix page 25a) That the Court below thought the problems raised in this matter "troublesome" is clearly demonstrated by its attempt to present a careful analysis of the particulars of the problem in a lengthy evaluation of the subject, as well as by some of its tentatively drawn conclusions.[5] The central issue in these considerations is the relationship of property interests not covered by the *Jones* rule in establishing standing. This open question has led to much scholarly review, for example see, Note, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems,* Catholic University Law Review, Volume 21, at p. 1 (1971), as well as many proposed solutions, see for example, Note, *Standing to Object to Search and Seizure,* University of Pennsylvania Law Review, Volume 118 at 333 (1970).

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[5] For example at Appendix page 34a: "[B]ut it is almost certainly true that property rights cannot support the Fourth Amendment claim in the absence of a reasonable expectation of privacy in the property involved."

(A) What Is the Role of Property Rights in Establishing Standing in Search and Seizure Cases in Light of Jones v. United States?

The requirement that a defendant have standing in order to invoke the exclusionary rule has become imbedded in modern Constitutional jurisprudence. It is further required by the Federal Rules of Criminal Procedure, Rule 41(e), although whether or not the language of that rule conforms to the full scope of the Court's power to grant relief pursuant to the Fourth Amendment has been suggested to be an open question. See Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on It's Last Leg,* Catholic University Law Review, Volume 18 at 150 (1968). Most commentators have observed that initially standing considerations were couched in terms of property interest. In this respect, the legality of contested searches was measured in terms of trespass to the home, *Weeks* v. *United States,* 232 U.S. 383 (1914), the office, *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385 (1918), the garage, *Taylor* v. *United States,* 286 U.S. 1 (1932), and hotel rooms, *Johnson* v. *United States,* 333 U.S. 10 (1948). The development of Fourth Amendment law also applied the trespass concept to personal property. For example the early case of *Ex Parte Jackson,* 96 U.S. 727 (1877), held that letters in sealed packages were protected. The development of the property concept, particularly with respect to standing is strongly embodied in this Court's opinion in *United States* v. *Jeffers,* 342 U.S. 48 (1951). In that case it was held that the criminal defendant had standing not on the basis of a possible interest in the premises, but rather on the basis of his interest in the personal property seized. The Court noted, "It being his property, for purposes

of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial." 342 U.S. at 54.

Jones v. *United States,* 362 U.S. 257 (1960), expanded the standing rule to include "automatic standing". The Court held in *Jones* that standing automatically exists in a case where possession of the seized evidence is itself an essential element of the offense with which the defendant is charged or, even where possession is not central to the charge, where the person seeking suppression was lawfully on the searched premises at the time of the search. The latter requirement abrogates the need for property intersts in the place searched or the things seized under certain circumstances. The question that has arisen is whether or not *Jones* adds an additional means of obtaining standing to the traditional property concepts or whether it abrogates those property concepts in favor of a different standard.

This Court's language in *Simmons* v. *United States,* 390 U.S. 377 (1968), states very clearly that *Jones* expanded the traditional property concepts rather than abrogated them in favor of a different standard:

> At one time, a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor of the seized property or that he had a possessory interest in the searched premises. In part to avoid having to resolve the issue presented by this case, we relaxed those standing requirements in two alternative ways in *Jones* v. *United States, supra.* 390 U.S. 389.

Despite the apparent clarity of the relationship between *Jones* and earlier cases based on property in-

terests, there has been confusion among the Courts as to the post-*Jones* standing criteria. The confusion in part seems to have resulted from the language in *Jones* with respect to privacy interests and the emphasis upon that concept in the case of *Katz* v. *United States,* 389 U.S. 347 (1967), which did not involve standing. The result is that while a proper reading of *Jones* and subsequent cases suggests that standing may be obtained by the alternate methods of property interest or automatic standing pursuant to *Jones,* that nevertheless, some Courts have allowed standing only in the *Jones* context or else only within a "right to privacy" context. As one commentator has noted, one of the results has been that *United States* v. *Jeffers,* 342 U.S. 48 (1951) which grants standing on a property concept, has been ignored by some Courts or held by others to be valid only upon a technical adherence to the facts in that case. See Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on It's Last Leg,* 18 Catholic University Law Review 150 (1968).

A review of the decisions of the Courts of Appeals on this question bears out this confusion. Several Courts of Appeals have recognized *Jones* as expanding the class of those who have standing to challenge an unlawful search and seizure. The United States Court of Appeals for the Ninth Circuit stated in *Diaz-Rosendo* v. *United States,* 357 F.2d 124, 131 (9th Cir. 1966) *cert. den.,* 385 U.S. 856, that "the *Jones* decision expanded the class of those who have standing to challenge an unlawful search and seizure. . . ." The Ninth Circuit later noted in *Sandejas* v. *United States,* 428 F.2d 1040, 1043 (9th Cir. 1970) *cert. den.,* 400 U.S. 879, that *Jones* modified the standing rule "to include

in the class of 'aggrieved persons' not only one against whom the search was directed or had a traditional property interest in the thing searched or seized, or was legally present on the searched premises but also one who is being charged with either actual or constructive possession of the seized property." A similar treatment of the problem has been stated by the United States Court of Appeals for the Second Circuit in *United States* v. *Bozza,* 365 F.2d 206, 222 (2nd Cir. 1966). See also *United States* v. *Boston,* —— F.2d ——, 16 C.L. 2292 (9th Cir. 12/9/74); *United States* v. *West,* 453 F.2d 1351 (3rd Cir. 1972).

In contrast to this approach, some Courts have merged the various concepts in trying to ferret out the appropriate standard. In the decision below, the Court of Appeals borrowing language from *Jones* has conditioned the traditional property concepts for standing upon "privacy" concepts:

> Generally, a defendant satisfies the standing re-requirement if he has an adequate possessory interest in the place or object searched to give rise to a reasonable expectation of privacy. Ownership usually constitutes such an interest, . . . but a reasonable expectation of privacy in the enjoyment of a place or object may attach where there is little or no proprietary interest. (citations omitted). Appendix page 35a.

The Court goes on to interpret this Court's decision in *Brown* v. *United States,* 411 U.S. 223 (1973), to hold that a proprietary interest will not yield standing absent an underlying reasonable expectation of privacy. See also *Hair* v. *United States,* 289 F.2d 894 (D.C. Cir. 1961); *United States* v. *Lopez,* 420 F.2d 313. By this latter interpretation the Court below has essen-

tially abrogated the traditional property concept by tacking on to the traditional rules an additional hurdle for a defendant to overcome in the form of a demonstration of privacy. Similarly, see *United States* v. *Fisher,* 500 F.2d 683, 690 (3rd Cir. 1974). This interpretation clearly delimits the ruling of *Jeffers, supra.*

(B) Can Privacy Be Applied in the Same Manner to An Illegal Search as to An Illegal Seizure of Property to Determine Standing?

For reasons that have been discussed *supra* it is Petitioners' contention that ownership of an item inherently includes an expectation that that item will be left undisturbed by intruders and further that that expectation constitutes the privacy element contemplated by modern Fourth Amendment jurisprudence. The Court below, however, appears to require more than that sort of inherent expectation of privacy for example where it notes that "we have been unable to discern the slightest privacy interest that defendants could reasonably assert in objects which they have never seen and of whose particular existence they were unaware until after the disputed search and seizure." (Appendix page 40a) This finding factually ignores the uncontroverted testimony that the recorder belonged to the Hunts and that it was seized without a warrant at the police station. The reasoning of the Court raises the unsettled question of whether privacy can be applied in the same manner to an illegal search as it can to an illegal seizure.

At the heart of this question is the fundamental definition of the term privacy. It is Petitioners' contention that privacy means the right to be left alone. *Katz* v. *United States,* 389 U.S. 347, 350 (1967). The

Fifth Circuit in the opinion below has ignored that concept, in effect holding that the Hunts' expectation that their property would be left alone did not constitute a reasonable expectation of privacy. As stated above, the Court of Appeals has redefined privacy as requiring more than the expectation of being left alone, but additionally, having the expectation that one's possessions will be unseen, unknown, or hidden to intruders. As the Hunts made no efforts to secret their possessions aside from entrusting them to the private investigators the Court below denied them standing by virtue of a supposed lack of privacy within the Court's own definition.

As a practical matter the Court of Appeals' standard of "secretness" may be identical to an "expectation of privacy" standard (in the sense of "being left alone") when that standard is applied to a search. For example, one would expect one's house to be ordinarily immune from visual search, but not one's open field, which is in plain view to the world. See *Hester* v. *United States,* 265 U.S. 57 (1924). In this context, with respect to a *search,* privacy may in practice be the same as secrecy. However, this rationale fails when applied to seizures. Accordingly, even though something may be in plain view in an open field, or even on a public sidewalk, it would be reasonable, in the absence of exigent circumstances, *McDonald* v. *United States,* 335 U.S. 451 (1948), for the property owner to have an expectation of privacy sufficient for standing to expect that police authorities will let him alone and not seize his property without a warrant. See *Patler* v. *Slayton, supra,* 503 F.2d 472 (4th Cir. 1974). *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), impliedly teaches the same lesson: a union officer could reason-

ably expect that his records, which were kept in a public office, and the existence of which were known generally, would be left alone unseized by intruders. See *United States* v. *Kenaan,* 496 F.2d 181 (1st Cir. 1974). See also *United States* v. *Boston,* —— F.2d ——, 16 Cr.L. 2292 (9th Cir. 12/9/74), which makes this distinction in connection with "automatic standing" cases. *Boston* holds that "privacy" considerations which normally apply to a search, and which are rendered unimportant by the *Jones* rule, are not relevant to the seizure question. With respect to the latter, interests other than "privacy", *e.g.* possessory interests, must be "offended".

The practical application of the "privacy rule"[6] as can be seen is perplexing and difficult. It is respectfully submitted that the solution of the Court below trammels the Fourth Amendment and is wholly unpractical. For this reason, the guidance of this Court is needed in respect to this issue.

III.

PETITIONERS HAD AUTOMATIC STANDING BASED UPON JONES v. UNITED STATES.

This case raises the new and unsettled question of whether an indictment charging that the defendants "wilfully, knowingly, and unlawfully did intercept and endeavor to intercept wire communications" is a possesory offense and gives them automatic standing

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[6] This Court's language in *Combs* v. *United States,* 408 U.S. 224 (1972) raises the question of whether "privacy" is even a proper criterion. In *Combs* the Court refers not to expectation of privacy but, in the language of *Mancusi* "a reasonable expectation of freedom from governmental intrusion . . . ." 408 U.S. at 227.

to contest the seizure of tapes and the information contained therein. Pursuant to *Jones* v. *United States,* 263 U.S. 257 (1960), in cases where an indictment charges a possessory crime, or a crime in which possession is an essential element, the defendant has the benefit of "automatic standing" to contest the seizure of evidence sought to be used against him.

To succeed in its wiretapping case, the government must prove as an element of the offense that the petitioners intercepted or endeavored to intercept any wire or oral communication. Pursuant to the definition contained in 18 U.S.C. §2510(4), " 'intercept' means the *aural acquisition* of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." (emphasis added) See also *Smith* v. *Wunker,* 356 F.Supp. 44 (D.C., Ohio, 1972), holding that for purposes of §2510(4) "aural acquisition" means to come into possession through the sense of hearing. Simply stated, possession of the knowledge of a communication, which is intangible, forms the basis of a conviction under §2511(1)(a). The issue in the present case narrows to whether the only possible tangible embodiment of that knowledge—a tape recording—deserves treatment pursuant to *Jones* as a possessory element since the tape seized contained the information which the petitioners are accused of possessing.

As far as petitioners are aware, this question has never been presented to the courts previously. The way in which it is answered will define the boundaries of "automatic standing" and eliminate much confusion in (a) prosecutions which do not appear on their face to be for possessory crimes, but are (such as §2511), and (b) prosecutions in which possession is not an ele-

ment of the crime, but is inextricably bound up with the proof of it.

The lower courts have wrestled with these considerations in prosecutions for interstate transportation of stolen motor vehicles, a violation of 18 U.S.C. §2312 (the Dyer Act, now known as the National Motor Vehicle Thefts Act). While the Dyer Act is not on its face a crime of possession, courts have often granted *Jones* standing to defendants charged with its violation, who seek to suppress illegally obtained evidence that they possessed the automobile. The rule that a jury may infer from the possession of an automobile recently stolen in another state that the possessor of the vehicle knew that it was stolen, and that he transported it in interstate commerce has led these courts to hold that such possession is in essence the basis for conviction under the Dyer Act. For that reason, automatic standing under *Jones* has been found even though though possession is not *per se* an element of interstate transportation of motor vehicles. *Simpson* v. *United States,* 346 F.2d 291 (10th Cir., 1965); *Reese* v. *United States,* 341 F.2d 90 (10th Cir., 1965); *Williams* v. *United States,* 412 F.2d 729 (5th Cir., 1969). The above recited Dyer Act cases reveal the unsettled nature of the parameters of *Jones* in connection with defining a "possessory" offense in cases where the possession of an item does not constitute the crime *per se* but is the only or best tangible evidence of its commission.

Another and similar controversy over the definition of a possessory crime under *Jones* exists where possession of an item is but one element of a crime. A restrictive interpretation of *Jones* was made in *United*

States v. *Konigsberg*, 336 F.2d 844 (3rd Cir. 1964), *cert.den., sub.nom., Celso* v. *United States*, 379 U.S. 930, the court there holding that where possession was only one element of the offense charged (unlawful possession of goods stolen from interstate commerce), "automatic standing" under *Jones* would not lie. Compare with *United States* v. *Cobb*, 432 F.2d 716 (4th Cir. 1970). But see *United States* v. *Allsenberrie*, 424 F.2d 1209 (7th Cir. 1970); *Niro* v. *United States*, 388 F.2d 535 (1st Cir. 1968); all holding that standing would lie when possession constitutes one essential element of the crime charged.

Thus, this Court's formulation of automatic standing in *Jones* has met with at least three diverse interpretations in the Federal Courts. Several courts require that possession be the sole element of the offense in order for the defendant to invoke standing. Other courts allow automatic standing where possession constitutes at least one element of the offense. Still others will grant automatic standing in the absence of any possessory element at all, where the offense is in essence a possessory offense and may be proven by resort to a "possessory presumption".

Because of these vastly differing interpretations of *Jones*, and particularly because of further recent questioning of the vitality of *Jones* in light of *Simmons* v. *United States*, 390 U.S. 377 (1968); see *United States* v. *Cobb, supra; United States* v. *Price*, 447 F.2d 23 (2nd Cir. 1971); *United States* v. *Smith*, 495 F.2d 668 (10th Cir. 1974) and in light of *Brown* v. *United States*, 411 U.S. 223 (1973), see *United States* v. *Dye*, —— F.2d ——, 15 Cr.L. 2541 (6th Cir. 8/22/74), the guidance of the Supreme Court is required.'

IV.

MAY THE GOVERNMENT EXTEND ITS TIME FOR AN INTERLOCUTORY APPEAL PURSUANT TO 18 U.S.C. § 3731 BY FILING A PRO FORMA MOTION FOR RECONSIDERATION.

Congress has provided in Title 18, U.S.C. § 3731 that the government may appeal from an order "suppressing evidence" and that

> The appeal . . . shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

In the instant case, the government filed a motion for reconsideration of an order suppressing evidence, Appendix 5, and later appealed from an order denying reconsideration.

Government appeals in criminal cases are "something unusual, exceptional, not favored". *Carroll* v. *United States,* 354 U.S. 394 (1951). Such appeals in the Federal Courts have thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 U.S.C. §3731, and the Criminal Appeals Act has traditionally been strictly construed by the courts against the governments right of appeal. *Will* v. *United States,* 389 U.S. 90 (1967), *United States* v. *Greely,* 413 F.2d 1103 (D.C. Cir. 1969); *United States* v. *Mersky,* 361 U.S. 431 (1960); *United States* v. *Hines,* 419 F.2d 173 (10th Cir. 1969); *United States* v. *Apex Distributing Co.,* 270 F.2d 747 (9th Cir. 1959); *United States* v. *Heath,* 260 F.2d 623 (9th Cir. 1958); *United States* v. *Nardolillo,* 252 F.2d 755 (1st Cir. 1958).

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[7] This court itself noted the troublesome question of the continuning vitality of *Jones* in view of *Simmons* in *Brown* v. *United States,* 411 U.S. 223, 228 (1973).

Since the government must be held to such a strict standard, their appeal must be from the proper order. The order of December 18, 1973, from which the government appealed, was not an order suppressing evidence, but was rather an Order denying the government's petition for reconsideration. Congress has enacted no law giving the Court of Appeals jurisdiction to entertain such an appeal and numerous courts have held that the denial of a motion for reconsideration is itself not appealable by the government. *Roemer* v. *Neuman,* 132 U.S. 103 (1889); *Pfister* v. *Northern Illinois Finance Corp.,* 317 U.S. 144 (1943); *United States* v. *Greely,* 413 F.2d 1103 (D.C. Cir. 1969); *In Re Gelinos, Inc.,* 51 F.2d 875 (7th Cir. 1931). Similarly, see *United States* v. *Peachtree National Distributors,* 456 F.2d 442 (5th Cir. 1972).

The petitioners are not unaware of this Court's language in *United States* v. *Healy,* 375 U.S. 75 (1964), which, unlike the present interlocutory appeal deals with an appeal from a final order. However, the burdens on the Federal Judiciary have greatly increased in the ten years since *Healy* was decided. "Unfavored" government appeals play their part in this overload. It is perfectly consistent with the twin goals of restricting government appeals, and aiding the Courts' dockets, to refuse to hear appeals taken in the dilatory manner as the one herein.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION

UNITED STATES OF AMERICA,

v.

NELSON BUNKER HUNT AND W. HERBERT HUNT

Docket No. CR 5-485

Memorandum Opinion

The defendants are charged with willfully, knowingly and unlawfully intercepting and endeavoring to intercept wire communications of persons calling to and from telephones located at the residences of six different persons in Dallas, Texas, in violation of Title 18, United States Code, section 2511(1)(a) and section 2. A separate count charges such a violation for each of the six telephones.

The defendants have duly filed a motion to suppress certain evidence, alleging that it was acquired in a manner which was violative of their rights under the fourth amendment. Specifically, they seek to prevent the admission by the government of any evidence obtained in or as a result of the search of a red Ford Mustang in Richardson, Texas on or about January 16, 1970. More specifically, the defendants complain of the seizure of a certain tape recorder from that automobile and the subsequent playing of the recording tape located thereon by the Richardson police and the Federal Bureau of Investigation. The contents of this tape alerted the investigating authorities to the violations alleged in the indictment.

Patrick W. McCann III and Jon Joseph Kelly have previously been charged in a four-count indictment flowing from four of the wire interceptions involved in the present case. McCann and Kelly were convicted in another court and sentenced to 3 years in prison. Their conviction was affirmed by the United States Court of Appeals for the Fifth Circuit in *U.S.* v. *McCann*, 465 F.2d 147 (5th Cir.

1972). The trial court denied the defendant's motion to suppress in that case and the denial was specifically reviewed and affirmed by the Court of Appeals in its opinion. The defendants Hunt are, however, certainly entitled to a separate and *de novo* consideration of their motion to suppress by this court.

Defendants have been afforded two evidentiary hearings in this case during which much testimony and several documents were introduced by both sides. After considering that evidence, along with the briefs and oral arguments of counsel, the court files this Memorandum Opinion which shall constitute the Findings of Fact and Conclusions of Law pertinent to defendants' motion to suppress.

Factual Background

For several days prior to the arrest of Kelly and the search of the Mustang on January 16, 1970, the Richardson Police Department had received several complaints from residents of that city that certain automobiles would be left unattended on residential streets for periods of a day or so and that then another automobile would be substituted for the first and similarly left unattended until it too was replaced. An investigation by the Richardson police revealed that all of these automobiles had been rented by certain persons who gave various hotels as their local addresses but listed fictitious Houston home and business addresses. The police also determined that these persons changed hotels more than once during the period in which the car switching occurred. A factor which was considered to be significant by the police was the presence of an identically arranged pile of newspapers several inches high and on a level with the transmission hump on the right front floorboard of all of the involved vehicles.

According to the testimony, the investigating officers discussed these facts periodically (there is conflicting testimony as to whether these discussions were daily or

weekly) at meetings held between shift changes. Included among various interpretations of these facts that were discussed were the possibilities that these cars were being used as a "narcotics drop," that they were being used in conjunction with a scheme to burglarize residences in the area and that they were somehow being used by private detectives involved in a domestic investigation. These facts had been communicated to George M. Taylor, the arresting officer, through these various meetings and discussions prior to the time of the arrest.

On January 16, 1970, officer Taylor was assigned to conduct a "stake-out" and surveillance of the Mustang, which was one of the cars that had been left unattended by the suspects on this particular day. He relieved officer Ray Pennington, who had been watching the parked Mustang during the day, and parked his own automobile in the driveway of a nearby residence, out of the view of anyone in or standing next to the Mustang. At the September 17, 1973 hearing on the motion to suppress, Taylor testified that, on the basis of the facts determined by or communicated to him, he "would go out there and do it and set up surveillance" and also that he was "going to stop the car and, if somebody came to pick it up, talk to them." (Transcript, p. 30) He further testified that, at that time, he had no knowledge that a crime was being committed by anyone connected with the automobile-switching.

About 5:00 P.M. on this same day Taylor observed a man approach the Mustang, stop near it, stoop to pull up his socks, look at all the tires and, finally, get in it and drive away. Taylor then followed the Mustang but he admitted that to this point the driver appeared to be engaged in purely legal activity. However, Taylor then switched on the red lights on his car so that the man in the Mustang would pull over for questioning. Taylor testified that the driver of the other car ran a stop sign before he pulled over to the curb and stopped. It should be noted that Jon

Joseph Kelly, who in fact was the driver of the Mustang at this time, testified that he did not run a stop sign. Taylor further stated that Kelly did not attempt to escape or in any other way avoid the officer's signal to stop. After Taylor stopped his car within a few feet of the Mustang, both drivers stepped out of their cars and met about midway between the vehicles. Taylor stated the he immediately informed Kelly that he was being charged with running a stop sign and with violation of "the suspicious persons ordinance." Interestingly, both of these charges were later dropped. Upon the officer's request, Kelly produced a valid Texas driver's license.

From this point there are significant contradictions between the testimony of the two men. Taylor testified that he asked Kelly "would it be okay if I go ahead and look in the car" that Kelly replied, "okay, go ahead." (Transcript, pp. 48, 49). Kelly, however, testified that Taylor did not seek permission to search the car but rather stated that, "I'm going to look in your car, I want to see what's in it, I want to see what's under the newspapers." Kelly flatly denied that he granted permission for the search.

In any event, officer Taylor walked to the driver's side of the car, leaned across the front seat and unlocked the passenger door. At that point Taylor noticed a green briefcase protruding from beneath the pile of newspapers on the floorboard. Taylor testified that he then asked Kelly what was in the briefcase, to which the reply was, "I have no idea." Taylor also stated that Kelly told him that a friend had dropped him off at the Mustang but that he did not know the friend's name nor could he further identify him. He then lifted away the newspapers, opened the attaché-type briefcase and discovered a tape recorder located therein.

Taylor testified that Kelly was close behind him during this search but Kelly contended that he had remained at his original position between the automobiles. Taylor

testified that he asked Kelly certain questions, among which was whether he was a private investigator working on a divorce case. According to Taylor's version of this episode, Kelly's reply was, "I think I need to call my attorneys," and at this point Taylor decided to arrest Kelly. Kelly, though, has denied requesting an attorney until he reached the police station, sometime later. Taylor then instructed Kelly to get inside the police car. By this time other officers had arrived to assist Taylor, and one of them drove the Mustang, which still contained the briefcase and recorder, to the police station. The car was parked in the station house lot and locked, and the keys were delivered to officer Taylor. Taylor reported to his supervisor, officer Burleson, and then retrieved the briefcase from the locked Mustang, without further seeking permission from Kelly or any other person. Taylor's testimony reveals that at this time he still did not have specific knowledge that a crime had been committed.

At no time did any of the investigating officers apply for or obtain a warrant to search or seize the Mustang or any of its contents nor, more pertinently, did they seek a warrant to search the seized tape by playing and listening to it. The evidence establishes, however, that a Magistrate or Justice of the Peace was located within five or six miles of the police station and, therefore, that the search warrant procedure was readily available to the police.

Despite the proximity of a Magistrate, officers Taylor and Burleson did indeed listen to the tape on this same day, and the record indicates that they were able to identify one of the persons whose voice was recorded on the tape. The officers then notified a security officer at the offices of Southwestern Bell Telephone Company, who in turn notified Special Agent Holloman of the F.B.I. After arriving at the police station about 7:00 P.M., Holloman listened to the tape and then accompanied Burleson to the Richardson home of a Mr. Rothermel, whose wife identified her voice

as being one of those on the seized recording. Employees of Southwestern Bell then located a transmitting device on the telephone pole behind the Rothermel home which was used to transmit signals from their telephone line to the recorder in the nearby car.

Subsequently Mr. McCann was arrested and Kelly's motel room was searched pursuant to a warrant. Defendants recognize that this court is bound by the validity of the search affidavit as far as the face thereof is concerned, but they do contend that the probable cause for the issuance of the warrant was based solely upon facts which were obtained through the allegedly invalid playing of the seized tape and misleading facts, and, therefore, that any evidence seized from the hotel room should be suppressed under the doctrine announced in *Silverthorne* v. *United States,* 251 U.S. 385 (1920), popularly referred to as the "fruits of the poisoned tree' doctrine.

McCann also testified that the defendants in this case had reimbursed Kelly and McCann, or the detective agency for which they worked, for all of the expenses of their investigation. These expenses included the rental fees for the cars involved, rental of the various motel rooms, and cost of the several tape recorders which were used and a quantity of recording tape. Edited tape recordings containing pertinent recorded conversations were to be given to the Hunts. McCann further testified that it was his understanding that the recorders, the tapes and all the other equipment used in the surveillance for which he was reimbursed belonged to the Hunts. Other personnel of the detective agency, Clyde Wilson & Associates, corroborated McCann's testimony as to payment for and ownership of the equipment.

The findings of this court as to the facts surrounding the arrest and detention of Kelly, the search of the Mustang and the briefcase therein, are substantially identical to the findings made by the Court of Appeals in its opin-

ion in *United States* v. *McCann, supra.* However, the defendants herein assert that additional evidence and legal grounds have been presented to this court that are sufficient to compel the granting of their motion to suppress, notwithstanding the denial of a similar motion in the Kelly-McCann case. The pertinent additional evidence appears to be as follows:

A. Arresting officer Taylor's testimony at the September 17, 1973 hearing that he would not have arrested Kelly if Kelly had answered that he was working on a divorce case;

B. Taylor's statement that he definitely decided to arrest Kelly only after Kelly asserted his sixth amendment rights by stating that he wanted to see his lawyer;

C. Taylor's testimony that when he left the Richardson police station on the afternoon of January 16, 1970 to stake-out the Mustang, he intended to stop and interrogate anyone who attempted to drive away in the car, even though he had no knowledge that a crime was being committed at that time;

D. Kelly's previously unoffered testimony that he did not give anyone permission to search the car and that he did not tell officer Taylor that he wished to see his lawyer.

The defendants' position is that the additional evidence shows that the arrest of Kelly was a sham since it was not based upon probable cause. Defendants also contend that the ensuing search of the automobile and playing of the tape were invalid under the fourth amendment.

Although it may be that had this additional evidence been originally presented to the District Court during the hearing on the motion to suppress by McCann and Kelly, that that court and the Court of Appeals would have granted the motion, this court feels, especially in view of the contradictory evidence between Taylor and Kelly,

that the decision of the United States Court of Appeals for the Fifth Circuit in *McCann, supra,* should control insofar as it is applicable to the points raised in that case. However, as will later appear, this court feels that there are certain legal matters and facts which were neither urged nor considered in that case, but which have a material bearing on the matter now before the court. In any event, this court concludes that officer Taylor had reasonable grounds to stop the Mustang and make a general investigative inquiry of its driver and that after the car was stopped there was either consent or probable cause to search the car. The search of the briefcase when it was located on the floorboard of the Mustang at the point of arrest was also authorized for the opinion of the Fifth Circuit held that

> "Detective Taylor would have been derelict in his duty had he not opened the briefcase."

However, the defendants in this case are entitled to have this court consider their motion to suppress based upon the testimony that has been presented to this court in the two evidentiary hearings. Along with the additional evidence delineated earlier the defendants raise the following evidence and legal arguments which were neither presented to nor considered by either the trial court or the appellate court in the *McCann* case:

Officer Burleson and officer Taylor, after the car had been locked and stored at the police station, obtained the briefcase, opened it, and played the tape found on the recorder. Subsequently, agent Holloman of the Federal Bureau of Investigation played the tape. None of these officers attempted to obtain a search warrant authorizing them to search the tape recording. Defendants take the position that the playing of the tape without a search warrant violates the defendants' fourth amendment rights and that the evidence secured by the prosecuting authorities by rea-

son of the information they obtained from this tape should be suppressed. The court finds that this point was not raised in the *McCann* case and that the opinion does not indicate that the Court of Appeals in any way considered the question of whether or not the playing of the tapes without a warrant was a violation of the defendants' fourth amendment rights.

This court is of the opinion that the position of the defendants is sound and that the motion to suppress should be granted. The court's reasoning is set out below.

STANDING

A threshold issue in this case is whether or not the defendants have "standing" to challenge the validity of the search, since they were not present at the scene. The Supreme Court of the United States in *Jones* v. *United States,* 362 U.S. 257 (1960), in construing the right of a person to assert fourth amendment rights by a motion to suppress filed under Rule 41(e), Federal Rules of Criminal Procedure, stated:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed to someone else."
>
> "To establish 'standing', courts of appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."

A case squarely in point on this issue of standing is *United States* v. *Jeffers,* 342 U.S. 48 (1951). That case involved a seizure of narcotics belonging to the defendant from an apartment which was not his residence, in which he had no

proprietary or possessory interest and in which he was not present during the search. Justice Clark, writing for the Supreme Court, held that defendant's property interest in the seized contraband was sufficient to support his standing to move for suppression of the evidence. The United States District Court for the Western District of Pennsylvania in 1957 held in *United States* v. *Lester,* 21 F.R.D. 376, affirmed 282 F.2d 750 that "one has the requisite standing as a person aggrieved if he claims *ownership* of the seized property, although the premises searched belonged to another." (emphasis added) The Sixth Circuit in 1965 in *United States* v. *Thomas,* 342 F.2d 133 stated that if an accused neither owned, possessed nor lived at the searched premises, was not present at the time of the search, and did not show any possessory interest in the objects seized, then he would have no standing to challenge the search. Mere ownership of a searched automobile gives standing, even when the owner is not present at the search. *Cash* v. *Williams,* 455 F.2d 1227 (6th Cir. 1972). In denying standing to an accused in *United States* v. *Banks,* 465 F.2d 1235 (5th Cir. 1972), the Court held that the defendant could not prevail under Rule 41(e) since he did not have sufficient propriety interest in the premises searched or possessory interest in the property seized.

The uncontradicted evidence produced at the evidentiary hearings in this court can lead only to the conclusion that the Hunts owned, and thus had a proprietary interest in, the tape recorder and tapes since they ultimately paid for both the tape recorder and the tapes. This proprietary interest is sufficient to give the Hunts standing to challenge the search and the evidence gathered thereby.

The government contends that *United States* v. *Johnson,* 456 F.2d 295 (5th Cir. 1972) is a "white horse" case and that it conclusively supports their position. The reasoning in *Johnson,* though, is inapplicable to the case *sub judice.* The Court of Appeals there held that the appel-

lant had no standing to challenge the search, but there was no evidence in that case that he had a proprietary interest in either the seized contraband or the searched van. Furthermore, *Johnson* is distinguishable from *Jones* v. *United States, supra,* because the former case did not involve a crime of possession and the appellant was not present during the search.

The court having determined that the defendants have standing to challenge the search in question, the next question to consider is the validity of the search.

VALIDITY OF THE SEARCH

In *Johnson* v. *United States,* 333 U.S. 10 (1947), the Court stated:

> "The part of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

It is well established that searches conducted outside of the judicial process, without prior approval of a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject to only a few specifically established and well-delineated exceptions. *Katz* v. *United States,* 389 U.S. 347 (1967); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *United States* v. *Graves,* 477 F.2d 1306 (5th Cir. 1973).

In determining whether or not the search of the tape recorder (*i.e.*, the playing of the tape found thereon) comes within one of the exceptions to the general requirement of a search warrant, the court has kept in mind that the Court of Appeals has already approved the procedures of the police in this case up to and including the opening of the briefcase. Therefore, this court must now examine the circumstances surrounding this latter search in light of the exceptions to the general rule.

The Sixth Circuit has delineated very explicitly these "exigent circumstances" exceptions to the general requirements of a search warrant in *United States of America* v. *Nelson*, 459 F.2d 884 (6th Cir. 1972), as follows:

(1) *Search of an Automobile*

The search involved in this case cannot fall within this exception. The traditional basis for this exception is the inherent mobility of an automobile and the consequent danger that the vehicle and its contents may be moved before a search warrant can be obtained. *See Carroll* v. *United States*, 267 U.S. 132 (1925) and *Chambers* v. *Maroney*, 399 U.S. 42 (1970). This rationale is inapplicable here, however, because the automobile and its contents were validly seized at the scene of the arrest and transported to the police station. The recorder and the tape were then carried into the station house, where the tape was played. Thus the search was conducted not at the point where the automobile was seized but later in the police station and, had the police delayed the search of the tape in order to obtain a search warrant, there would have been no danger that the tape could have been carried away in the automobile.

(2) *Incident to Lawful Arrest*

The search of the tape recorder and the playing of the tapes was not made incident to a lawful arrest. *See Chimel*

v. *California,* 395 U.S. 752 (1969). The search was not made at the scene of the arrest and in fact was made some two hours later after Kelly had been arrested and locked in his cell in the city jail. The Fifth Circuit in *United States* v. *Davis,* 423 F.2d 974 (1970), held under somewhat similar circumstances that there was no justification for search without a warrant. In that case a search was conducted three and a half hours after the arrest of the accused, and while searching for the pistol the police went to his home and without a warrant searched the home. The Fifth Circuit held that, to be incident to an arrest, the search must be justified by the need to seize weapons or the need to prevent the destruction of evidence, but that these justifications are lacking where the search is remote in time or place from the point of arrest.

It would be unreasonable to hold that, although the tape recorder was seen and discovered at the place of arrest, that the playing of the tape thereon was also incident to arrest when there was absolutely no danger of its destruction, it was in the possession of the police and the driver of the car was in jail, and there is no indication that the search was in any way connected with a seizure of weapons or an attempt to prevent the escape of Kelly or anyone else.

In *Brett* v. *United States,* 412 F.2d 401 (5th Cir. 1961), the appellate court held that a search of an accused's clothing, which had been placed in custody of the jailer in the prisoners' property room, made three days after arrest was invalid. The court held that this search was not incident to arrest and was not even close to or contemporaneous with the time of arrest. In that case the Fifth Circuit held that none of the circumstances justifying application of the "search incident" exception were present because there was no danger that the clothing would be removed nor that they concealed weapons which could be used by the defendant in an escape attempt and there was ample time to obtain a search warrant. The same statements and findings can be applied to the case under consideration by

this court. The court went on to hold: "Focus in the Fourth Amendment today is on privacy rather than on property rights." *Id.* at 406. The Fifth Circuit in a subsequent case, *United States* v. *James*, 432 F.2d 303 (1970), found that a search made after the time of arrest and at a different place from the arrest itself was necessary for effective law enforcement and that such effective law enforcement would have been frustrated if there was any delay as there were conspirators possibly still at large. Of course *James* can be distinguished from *Hunt*, because at the time of the search in the latter case, the police could have had no indication that there were co-conspirators loose who might escape.

In *Chimel* v. *California, supra*, the Court, in holding the warrantless search of a room invalid, quoted *Trupiano* v. *United States*, 334 U.S. 699 (1948), which stated:

> "A search or seizure without a warrant as an incident to lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of arrest. But there must be something more in the way of necessity than merely a lawful arrest."

Id. at 759. The requisite necessity is clearly lacking in the present case.

(3) *Plain View Doctrine*

The plain view doctrine is not applicable here. *See Harris* v. *United States*, 390 U.S. 234 (1968). Although the briefcase was seen by the officer while engaged in the lawful search of the car, this court does not hold that the seizure or opening of the briefcase was unlawful, but that it was the playing of the tape itself, (without authority of a properly issued search warrant) that this court holds to be unwarranted.

The government has argued that the contents of the tape were in plain view, just as would be the writing on a piece

of paper. That argument is illogical, however, for there are obvious intrinsic differences between the two. This court holds that the playing of the tape was a separate search in itself and that the recorded conversations were not in the "plain view" of the investigating officers. The government further argues that the playing of the tapes was an analysis of lawfully obtained evidence to determine whether it was an instrumentality of crime rather than a search for evidence. The prosecution compares the playing of the tape to dusting for fingerprints, analyzing suspected narcotics, and testing blood found on weapons. This attempted analogy is not persuasive to the court. The government's semantics are not sufficient to overcome this court's opinion that the playing of the tape was a search of the tape recorder for the purpose of finding incriminating evidence.

(4) *Consent*

Of course, if anyone having authority to do so had consented to the playing of the tape, then the search would have been valid even without a warrant. *Frazier* v. *Cupp,* 394 U.S. 731 (1969). The only person that could have given consent in this case was Kelly. Even if Taylor's version of what happened at the scene of arrest is accepted, that is that consent to look into the car was obtained, this cannot be construed as consent to play the tape. Consent is clearly not present under the facts of this case.

(5) *Immediate Threat of Life*

Again, at the time this tape was played no one accused or under suspicion in this case, was in close proximity to either the tape recorder or the tape. Only Kelly was present at the police station and he was incarcerated during the search. To state that it was necessary to play the recorder and the tape thereon in order to prevent an immediate threat to life would be absurd. *See Terry* v. *Ohio,* 392 U.S. 1 (1968).

(6) *Officers in Hot Pursuit of a Fleeing Felon*

The only pursuit involved in this case was the initial pursuit by Taylor of Kelly when he drove away in the Mustang. Even had the search taken place immediately after that pursuit, the exception would not apply because Taylor had no knowledge that Kelly had committed a crime. Regardless, the search with which this court is concerned took place two hours later at the police station and was in no way connected with the initial pursuit. *See Warden, Md. Penitentiary* v. *Hayden,* 387 U.S. 294 (1967).

Exigencies of the Situation

Although the above-discussed categories have been listed as exceptions to the search warrant requirement of the Fourth Amendment, the reported cases also hold generally that "exigent circumstances" must be present before a warrantless search may be conducted. *See,* e.g., *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). While the six categories are in fact examples of "exigent circumstances," this court is of the opinion that a more general analysis of the exigencies in the case at bar is required.

In 1948 the Supreme Court of the United States held in *McDonald* v. *United States,* 335 U.S. 451, at page 456, that:

> "We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation make that course imperative."

It is well settled that the burden is upon the United States of America to show an exception to the rule that a search without a warrant is *per se* unreasonable. To do so exigent circumstances must be shown to have existed.

In *United States of America* v. *Arturo Garay, et al.,* 477 F.2d 1306 (5th Cir. 1973) at page 1308 the court held:

> "While the exigencies of the situation may well have justified the warrantless detention of appellants, they

> cannot validate the search of the suitcases made at the time when appellants were under restraint, if not under formal arrest. At that point, appellants were incapable of concealing or destroying the suitcases or their contents. Nor was there any significant probability that the suitcases would escape search by being moved to Chicago or Detroit aboard the airplane. . . . "

In that case the appellants had been arrested at an airport and their two suitcases had been loaded aboard their plane. The luggage checks were in the possession of the police and even there the search of these suitcases without a warrant was declared invalid. The court went on to hold:

> "In short, the officers could and should have held the bags until they obtained a warrant authorizing an examination of the contents."

Id. at 1308. Further, this court is of the opinion that the motion to suppress in this case should be granted under the holding of the Fifth Circuit in *United States of America* v. *Soriano, et al.*, 482 F.2d 469 (5th Cir. 1973).

There the officers had observed the defendants place three suitcases in the trunk of a taxicab. The court held that the officers' previous knowledge justified the stopping of the taxicab and the arrest of the accused. The officers also took the suitcases from the trunk and on the scene opened and searched them. It was held that the agents had probable cause to believe that the occupants of the taxicab were carrying narcotics and they were justified in opening the trunk and removing the suitcases and could seize the suitcases. However, the crucial question there was whether the officers could open and search the validly-seized suitcases without first obtaining a warrant. The court, after holding that the suitcases were effects under the Fourth Amendment, held that the search was invalid.

The government argued that the exigent circumstances required an immediate search without a warrant and that

in any event no warrant was needed to search personal property after that property had been validly seized. The court expressly rejected both contentions and, with respect to the right to search personal property validly seized without a warrant, held:

> "In this case the search significantly increased the interference with privacy. As a factual matter it differed markedly from the initial seizure after which the contents of the suitcases remained undisclosed to the world."
>
> "Thus the search was unlawful because it intruded on an interest protected by the Fourth Amendment and because a warrant could have been readily obtained without prejudicing the need for effective law enforcement."

Id. at . Certainly the evidence sought to be suppressed in the *Hunt* case falls within the purview of this holding. The search made after the seizure, that is the playing of the tape, significantly increased the interference with privacy and it differed markedly from the initial seizure which was and is here held to be proper. After the initial seizure, the contents of the tape remained undisclosed and a warrant could have been readily obtained from the proper authority without impairing the ability of the police to enforce the law in this case.

The police had probable cause to stop and arrest Kelly and to seize the tape recorder and tape. "These were legitimate intrusions by way of seizure, but such legitimate intrusions by way of seizure do not topple like dominoes all remaining privacy interests in the personal effect." Page 12, *United States* v. *Soriano, supra.* The Fifth Circuit in *Soriano* also quoted the Supreme Court in *Chimel* v. *California, supra,*:

> "There is no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions

should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."

It is the holding and conclusion of this court that though the detention of Kelly, his arrest, and the seizure of the briefcase and the tape recorder were warranted by the circumstances and were all legitimate intrusions upon fourth amendment rights, the further intrusion of playing the seized tape was not justified.

Accordingly it is ORDERED that the defendants' motion to suppress the admission into evidence of the tape and the contents thereof be GRANTED. It is further ORDERED that this motion to suppress will be granted as to all evidence gathered as a result of the playing of the tape under the doctrine of *Silverthorne* v. *United States*, 251 U.S. 385 (1920) and *Wong Sun* v. *United States*, 371 U.S. 471 (1962). An order will be issued accordingly.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 14th day of November A.D. 1973.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

Filed Dec. 14, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Cr. No. 5-485

UNITED STATES OF AMERICA

v.

NELSON BUNKER HUNT and W. HERBERT HUNT

Petition for Reconsideration

Comes now the United States of America, by its undersigned attorneys, and hereby petitions this Honorable Court to reconsider and rescind its Order of November 14, 1973, and to deny the Motion to Suppress filed herein. The grounds for this Petition are set forth in the attached Memorandum filed herewith.

Dated:

Respectfully submitted,

FRANK D. MCCOWN
United States Attorney

By: R. H. STEPHENS
Attorneys for the United States

Filed Dec. 1, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Cr. No. 5-485

UNITED STATES OF AMERICA

v.

NELSON BUNKER HUNT and W. HERBERT HUNT

Order

This court entered its final order granting a motion to suppress certain evidence in the above case which final order was dated November 14, 1973. The United States of America has now filed with this court a petition for reconsideration.

The court has examined the government's petition and memorandum in support thereof and is of the opinion that such petition should be and the same is hereby DENIED.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 18th day of December A.D. 1973.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

Filed Jan. 15, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Criminal No. Cr 5-485

UNITED STATES OF AMERICA

v.

NELSON BUNKER HUNT and W. HERBERT HUNT

Notice of Appeal

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Court's order entered in this action on December 18, 1973, suppressing certain evidence of the government.

I, Frank D. McCown, United States Attorney for the Northern District of Texas, hereby certify that this appeal is not taken for the purpose of delay and that the evidence so suppressed is substantial proof of facts material in these proceedings.

/s/ FRANK D. McCOWN
Frank D. McCown
United States Attorney

Sworn to before me this 15th day of
January 1974.

U. S. District Clerk
Northern District of Texas

By LEE SULLIVAN
Deputy

Filed May 17, '74

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1142

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

NELSON BUNKER HUNT and W. HERBERT HUNT,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before GEWIN, GODBOLD and CLARK, Circuit Judges

By the COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is denied.

W.G.
CC
JCE

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 74-1142.

UNITED STATES OF AMERICA, *Plaintiff-Appellant*,

v.

NELSON BUNKER HUNT and W. HERBERT HUNT, *Defendants-Appellees*.

Dec. 23, 1974.

Defendants, charged with intercepting telephone communications, moved to suppress tape recorder seized by officer from automobile of employee of private investigation agency allegedly hired by defendants to perform electronic surveillance and to suppress evidence gathered as result of playing of tape. The United States District Court for the Northern District of Texas at Lubbock, Halbert O. Woodward, J., 366 F.Supp. 172, held that stop and search of the automobile were proper but that playing of tape violated defendants' Fourth Amendment rights and government appealed. The Court of Appeals, Goldberg, Circuit Judge, held that defendants had no expectation of privacy in the tape recorder and tape which they had never seen and which they did not know existed until after the disputed search and seizure, and that principal-agent relationship between defendants and investigators, although sufficient to imply culpability for agents' violation of wiretapping statute, was not sufficient to confer standing for Fourth Amendment purposes.

Reversed and remanded.

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Appeal from the United States District Court for the Northern District of Texas.

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

This case presents a troublesome question of standing to contest the legality of a police search and seizure of certain instruments of electronic surveillance allegedly employed by brothers Nelson Bunker Hunt and W. Herbert Hunt against a group of their own relatives and some employees of their father, H. L. Hunt. After indictment on charges of wilfully, knowingly and unlawfully intercepting and endeavoring to intercept wire communications of certain persons in violation of 18 U.S.C. §§ 2511(1)(a) and (2),[1] defendants filed a motion to suppress the disputed evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. After a hearing, the district court concluded that defendants had standing to contest the search and seizure and that a part of the search was in fact illegal, and accordingly granted the motion to suppress. Since we find no warrant in the Fourth Amendment for surrogate privacy, we believe that the district court erred in finding a sufficient nexus between the search and defendants' Fourth Amendment rights to confer standing to contest the police action. We must reverse.

Sometime in late October or early November, 1969, the defendant Hunt brothers allegedly contacted one Everett, the president of a Houston, Texas, private investigation

[1] 18 U.S.C. § 2511 provides, in pertinent part:

(1) Except as otherwise specifically provided in this Chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both. [Section two lists various exceptions to the general rule of section one.]

agency, regarding the possibility of employing his agency to perform electronic surveillance of certain residences in Dallas, Texas. The Hunts purportedly represented to Everett that they had been the victims of extensive embezzlement and desired to obtain information concerning suspected employees. Everett contacted McCann, an electronics expert, and asked him to travel to Dallas to make an estimate of the job requirements and costs. When McCann returned to Houston and reported his findings, Everett contacted the Hunts and the deal was consummated.

The electronic surveillance operation required the use of tape recorders and tapes, which McCann purchased at retail stores, and certain other paraphernalia, including telephone transmitters, most of which McCann manufactured himself. McCann engaged a man named Watson to install some of the electronic equipment on strategically-located telephone poles and in various rental automobiles which were parked on a rotated basis outside the target houses. McCann and Kelly, an employee of Everett's detective agency, worked in Dallas throughout late December, 1969, and early January, 1970, rotating the automobiles which McCann and Kelly would rent, use and then return to the various rental agencies. The pair also changed the tapes when necessary, "condensed" the original tapes—edited out extraneous telephone conversations— and gave the master tapes to defendants.[2] McCann returned to Houston on or about January 9, and at some point thereafter, Everett presented defendants with a bill for all expenses incurred by McCann, Kelly and Watson, including the cost of the equipment, auto rental fees and food and lodging expenses, and for the cost of the services of the three gentlemen. When defendants paid their bill, Everett

[2] The original tapes were erased and reused after their contents, as edited, had been transferred to the master tapes.

sent them an itemized receipt. Everett later paid McCann, Kelly and Watson for their services and reimbursed them for their expenses.

The spectacle of strange automobiles appearing and remaining unattended for some hours before being removed and replaced by other strange unattended autos did not pass unnoticed in the quiet Dallas suburb of Richardson, Texas, where one of the "suspected" Hunt employees lived. An alarmed neighbor alerted the Richardson police to the unusual activity on January 9 and the police began to surveill the surveillers. On January 16, 1970, after the police investigation of the matter had turned up some very suspicious circumstances relating to the recent activities of McCann and Kelly, but before the police were able to decide whether the pair were involved in the narcotics trade, a burglary ring, or the investigation of an unpleasant divorce, a Richardson police officer observed Kelly enter a suspected auto and drive away. The officer followed and indicated to Kelly that he should pull over; Kelly promptly did so.

After a brief conversation, the officer walked over to Kelly's vehicle, noticed a pile of newspapers on the floor, lifted the papers and discovered a tape recorder. He then arrested Kelly and the two men drove to a police station, where police officers proceeded to play one of the tapes without bothering to obtain a search warrant beforehand. The playing of the tape prompted an investigation which led to the indictment and conviction of McCann and Kelly on federal wiretap charges and to the indictment of defendants here.

The facts of the original search of Kelly's car were recounted at length by this Court in United States v. McCann, 5 Cir. 1972, 465 F.2d 147, cert. denied, 412 U.S. 927, 93 S.Ct. 2747, 37 L.Ed.2d 154, and need not be repeated here; suffice it to say that we found that the officer who searched the

automobile had both Kelly's consent to search and probable cause to do so. The defendants here claim that our decision in *McCann* suffered from a lack of certain evidence which they have now supplied—evidence which tends to indicate that Kelly did not consent to the search of the auto and that the officer had no probable cause to search the vehicle in any case. The district court below found otherwise, 366 F.Supp. 172, and concluded that the stop and search of Kelly's auto were proper. The court also found, however, that the playing of the tape constituted a second search without a warrant, and that this search violated defendants' Fourth Amendment rights. Applying the fruit of the poisonous tree doctrine, Wong Sun v. United States, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; Silverthorne v. United States, 1920, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, the district court ordered that "all evidence gathered as a result of the playing of the tape" be suppressed. 366 F. Supp. at 183. Since defendants have no standing to contest either search, we pretermit further discussion of the legitimacy of those searches.

I

The requirement that a litigant have "standing" to contest a particular lawsuit is based upon the metaphysical notion that, in our adversary legal system, a court must be very certain that the parties before it have "a personal stake in the outcome of the controversy," Baker v. Carr, 1962, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678, so that each side will represent its particular interests to the best of its abilities and thus afford the court a fully-informed choice between two clearly-stated alternatives. *See* Flast v. Cohen, 1968, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947. In practice, of course, things do not always work out that way; many individuals and groups who are genuinely interested in a given controversy may be unable

to satisfy the traditional requirements for standing. For this reason, among others, the law of standing has been liberalized over the past decade in many areas to comport with the reality of litigant interest. *See, e.g.,* Data Processing Service v. Camp, 1970, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184; Barlow v. Collins, 1970, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192; Flast v. Cohen, *supra;* Griswold v. Connecticut, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. At the same time, the policies supporting a standing requirement have retained sufficient vitality to ensure that litigants must show more than a *de minimis* interest before they will be admitted into the courtroom. *See, e. g.,* Sierra Club v. Morton, 1972, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636.

In some respects, the necessity of standing to object to unconstitutional searches and seizures is more anomalous than most standing requirements. The major rationale for the exclusionary rule, whereby evidence obtained in an unconstitutional manner may not be used in a criminal prosecution, is that only such a drastic means will effectively deter law enforcement officials from violating the Fourth Amendment rights of citizens. *See* Mapp v. Ohio, 1961, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; Weeks v. United States, 1914, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652.[3] Given this premise, one might suppose that any citizen should be able to apprise the courts of unconstitutional searches and seizures; otherwise, policemen might in some cases break the law with impunity. However that may be, there is no precedent for not demanding standing to question a search. The courts have settled upon a requirement of some "standing" to contest Fourth Amendment viola-

[3] For a lengthy critique of the deterrent efficacy of the exclusionary rule, *see* Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970); *see also* the dissent of Chief Justice Burger in Bivens v. Six Named Unknown Agents, 1971, 403 U.S. 388, 411, 91 S.Ct. 1999, 29 L.Ed.2d 619.

tions, reasoning that the added deterrent effect of a "no standing" or minimal standing rule in search and seizure cases would be of slight social value in comparison with the large social cost imposed by criminals who would take advantage of such a rule. Although as an abstract proposition of law, the standing requirement might not have logical primordialty, it does possess interpretative validity and solidity; it is not the case "that anything which deters illegal searches is thereby commanded by the Fourth Amendment." Alderman v. United States, 1969, 394 U.S. 165, 174, 89 S.Ct. 961, 967, 22 L.Ed.2d 176, 187.

II

In order to determine the precise extent of the standing requirement as it applies in this case, we must first analyze just what demonstrable interests are requisite to standing; we must determine what individual rights and liberties the Fourth Amendment protects.

It is often aserted that the Fourth Amendment's function is to preserve and protect "the right of privacy" for all citizens. As is frequently the case with broad generalizations, this characterization says at once too much and too little. The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment was enacted while the memory of British tyranny was fresh in the minds of the Founding Fathers. The British military had latterly become accustomed to taking whom or what they wanted at any time they wanted, and for any reason or no reason at all. This course of

official conduct did not find favor with a generation of Americans which accounted the rights of personal liberty and private property as the most valuable and basic of human expectations. The rights of liberty (including the right of privacy) and of property were not as clearly differentiated in the minds of eighteenth-century Anglo Americans as they are in modern estimation. Blackstone, for example, was of the opinion that property is the right to exclude,[4] and American jurisprudence preserved this conceptual unity of privacy and property for Fourth Amendment purposes for a very long time.

In Boyd v. United States, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, the United States Supreme Court held that a federal statute compelling production of certain private papers was an unconstitutional "invasion of [the defendant's] indefeasible right of personal security, personal liberty and private property" which struck at "the very essence of constitutional liberty and security". 116 U.S. at 630, 6 S.Ct. at 532, 29 L.Ed. at 751. *Boyd* was an affirmation of the principle that some things cannot be searched or seized regardless of whether a proper procedure is followed, that a search of private papers is *per se* an "unreasonable search." This doctrine of absolute immunity of certain types of personal property from search or seizure was not undone until 1914, when the Supreme Court, in Weeks v. United States, *supra*, adopted the exclusionary rule and substituted a concern for proper procedure for the former concern for the nature of the thing searched or seized. Even after *Weeks*, the philosophical legacy of

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[4] "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." Blackstone, Commentaries, Book II, Chapter I. *See also* the famous opinion of Lord Camden in Entick v. Carrington, 1765, 19 How. St. Trials.

Blackstone and *Boyd* was so firmly implanted in the collective consciousness of American courts that instrumentalities of a crime could not be seized until 1921, Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647, and "mere evidence" of a crime could not be seized until 1967. Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782.

The procedural revolution begun in *Weeks* has taught us that the Amendment builds no impermeable barrier between an individual's person, house, office, automobile or strongbox and the outside world. If law enforcement officials follow the proper procedures to ensure that they can demonstrate sufficient interest in a particular person, place or thing, then they may seize and examine the object of their investigation.

Perhaps the fact that policemen can now, under the proper conditions, search and seize anyone or anything has compelled the courts to make a careful study of which search procedures are repugnant to those widely-held concepts of personal security and dignity which have been subsumed into the "right of privacy." It is this study which led to Justice Stewart's comment in Katz v. United States, 1967, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582, that "the Fourth Amendment protects people, not places." This part of the Fourth Amendment inquiry has required a determination, not of what privacy is—for everyone assumes agreement on that point[5]—but of whether a given individual in a given situation could have a reasonable expectation of privacy in the particular place or thing searched. So it was that in Jones v. United States, 1960, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the Supreme Court determined that an invitee had a cognizable privacy

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[5] Justice Stewart defines the "*general* right of privacy" as an individual's "right to be let alone by other people." Katz v. United States, *supra*, 389 U.S. at 350-351, 88 S.Ct. at 511, 19 L.Ed.2d at 581. *See* Fried, "Privacy," 1968, 77 Yale L.J. 475.

interest in preserving the apartment in which he was a guest from unlawful intrusion by the police. In Katz v. United States, *supra*, the Court ruled that an individual has a significant privacy interest in insulating his own telephone conversations from electronic monitoring, whether he makes his calls from his own home or from a public telephone booth.

If modern Supreme Court interpretations of the Fourth Amendment are dominated by the concept of the right of privacy, the Court has not foresworn an examination of property rights in order to determine the presence or absence of privacy interests. Although the Court announced in Warden v. Hayden, *supra*, "[t]he premise that property interests control the right of the Government to search and seize has been discredited," 387 U.S. at 304, 87 S.Ct. at 1648, 18 L.Ed.2d at 790, that same Court determined two years later in Alderman v. United States, *supra*, that an individual's property interest in his own home was so great as to allow him to object to electronic surveillance of conversations emanating from his house, even though he himself was not a party to those conversations.[6]

In summary, although the right of privacy has been the major theme of modern Fourth Amendment jurisprudence, the property rights rationale cannot be ignored altogether.[7] Perhaps it would not be too much to say that the continuing concern with property rights is prompted by the re-

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[6] Justice Harlan objected strenuously to this reliance on the property underpinnings of the Fourth Amendment, and would have preferred to rely on the "substantive principles developed in *Katz*." 394 U.S. at 191, 89 S.Ct. at 976, 22 L.Ed.2d at 197.

[7] As Justice Black noted in dissent in Griswold v. Connecticut, *supra*, "[t]he average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . ." 381 U.S. at 509, 85 S.Ct. at 1695, 14 L.Ed.2d at 530.

alization that an individual often has a very reasonable expectation of privacy in his private property, and that it is this expectation which the Fourth Amendment protects. There may be a cognizable Fourth Amendment interest in the absence of a traditional property right, but it is almost certainly true that property rights cannot support a Fourth Amendment claim in the absence of a reasonable expectation of privacy in the property involved. Such an analysis would go far in explaining the Court's tendency in the last fifteen years to discard traditional property concepts in search and seizure cases where, as in *Jones, Hayden* and *Katz,* those concepts seem no longer to reflect modern expectations of privacy in the place or thing in question, and the willingness of the Court to rely on those same property concepts where, as in *Alderman,* the common law continues to reflect modern ideas of personal dignity and security.

III

We have discussed the logical and constitutional bases of the standing requirement in Fourth Amendment cases; we now address ourselves to an examination of the case law on the subject. Since this action comes to us in the posture of an appeal of an order suppressing evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, we begin with an exposition of that Rule, which provides in pertinent part that:

> A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without a warrant . . .

The Supreme Court held in Jones v. United States, *supra,* that in order to qualify as a "person aggrieved by an unlawful search and seizure" for purposes of Rule 41(e), "one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished

from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U.S. at 261, 80 S.Ct. at 731, 4 L.Ed.2d at 702.

Since *Jones*, the development of the law of standing in Fourth Amendment cases has turned on whether the defendant in question was a "victim" of the search, the "one against whom the search or seizure was directed." Generally, a defendant satisfies the standing requirement if he has an adequate possessory interest in the place or object searched to give rise to a reasonable expectation of privacy. Ownership usually constitutes such an interest, United States v. Banks, 5 Cir. 1972, 465 F.2d 1235, cert. denied, 409 U.S. 1062, 93 S.Ct. 568, 34 L.Ed.2d 514, but a reasonable expectation of privacy in the enjoyment of a place or object may attach where there is little or no proprietary interest. In *Jones*, for example, the defendant was present as a common law "invitee" in the apartment of a friend, when police performed an illegal search of the apartment. The Court awarded the defendant standing even though his common law possessory interest did not amount to much, because he was legitimately on the premises, and thus had a privacy interest in the apartment.[8] The *Jones* Court merely enunciated the unremark-

[8] Many standing cases since *Jones* have concerned themselves with the phrase "legitimately on the premises." For example, an individual who has paid for his hotel room has a reasonable expectation of privacy in that room, Garza-Fuentes v. United States, 5 Cir. 1968, 400 F.2d 219, cert. denied, 1969, 394 U.S. 963, 89 S.Ct. 1311, 22 L.Ed.2d 563; one who hides from the police in a hotel room for which he has not paid, however, has no standing to contest a search of the room. United States v. Gregg, 6 Cir. 1968, 403 F.2d 222, aff'd, 1969, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442. Although this distinction might seem to turn on a comparison of the property interests involved, the property interests are really only indicators of the various expectations of privacy peculiar to each situation. *See* Baker v. United States, 1968, 131 U.S.App.D.C. 7, 401 F.2d 958.

able proposition that an individual may have a reasonable expectation of privacy in a place other than his own home. In this tradition, in Mancusi v. DeForte, 1968, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154, the Supreme Court found that an individual could reasonably expect freedom from governmental intrusion into his working area, even though he shared parts of an office with others. Conversely, a defendant cannot claim standing if he neither has a cognizable property interest in the place or thing searched, nor was he present at the time of the search. United States v. McConnell, 5 Cir. 1974, 500 F.2d 347; United States v. Palazzo, 5 Cir. 1974, 488 F.2d 942; United States v. Sullivan, 5 Cir. 1973, 488 F.2d 138.

In *Jones*, the Court also created the doctrine of "automatic standing," whereby, in a case where possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge admission of the evidence.[9]

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[9] The Court adopted the *Jones* rule in order to eradicate the unseemly practice whereby prosecutors would deny at the suppression hearing that a defendant charged with a possessory offense actually owned the disputed evidence, thereby forcing the defendant to claim ownership; the prosecutor would then confront the hapless defendant at trial with his claim of ownership made at the suppression hearing. *Jones* enabled a defendant in such a case to contest a search without admitting ownership. In Simmons v. United States, 1968, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247, however, the Court held that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment Grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt. Although *Simmons* appears to have removed much of the opportunity for the sort of abuse at which the *Jones* rule is aimed, and although the Court has recently cast some doubts on the continued vitality of *Jones*, Brown v. United States, 1973, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208, the rule is still the law.

One of the most significant aspects of the law of standing in search and seizure cases, and one that clearly reflects the intensely personal nature of Fourth Amendment rights, is the rule that interpersonal relationships cannot make a "victim" of one who is not otherwise "one against whom the search or seizure is directed." Generally speaking, the Fourth Amendment protects the "I" but not the "thou." So it is that one spouse may not complain if the other is searched. United States v. Altizer, 5 Cir. 1973, 477 F.2d 846; *but see* Alderman v. United States, *supra*, 394 U.S. at 193-194, 89 S.Ct. at 977, 22 L.Ed.2d at 198 (Harlan, J., concurring in part and dissenting in part). Nor may one business partner assert an interest in the search of another partner solely on the basis of the partnership relation. United States v. Frick, 5 Cir. 1973, 490 F.2d 666. Finally, Alderman v. United States, *supra*, dictates that co-defendants and co-conspirators may not assert the Fourth Amendment rights of their alleged partners in crime solely on the basis of their interpersonal association, because Fourth Amendment rights are personal ones. See United States v. Sullivan, *supra;* Granza v. United States, 5 Cir. 1967, 377 F.2d 746. Since co-defendants and co-conspirators can often make out some semblance of a property right in the sorts of things that might be searched and seized from their cohorts, *Alderman* demonstrates once again the primacy of privacy in the modern Fourth Amendment schema.

The Supreme Court has recently restated the law of standing in search and seizure cases, in Brown v. United States, 1973, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208. In *Brown*, two defendants were convicted of conspiring with a third individual to transport stolen goods in interstate commerce. Evidence obtained from an allegedly unlawful search of the co-conspirator's premises was admitted in the separate trial of the other two defendants. The Court, relying on *Alderman*, concluded that the dis-

puted evidence was rightfully admitted against defendants, who alleged a possessory interest in neither the premises searched nor the merchandise seized:

> [T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure . . ." 411 U.S. at 229, 93 S.Ct. at 1569, 36 L.Ed.2d at 214.

Although the rule of standing applied to the specific facts of *Brown* might appear at first glance to be somewhat more restrictive than previous formulations with respect to the search and seizure of objects, the Court's later remark that defendants "failed to allege any *legitimate* interest of any kind in the premises searched or the *merchandise seized*," 411 U.S. at 229, 93 S.Ct. at 1569, 36 L.Ed.2d at 214 (emphasis added), clearly indicates that *Brown* conforms to the general rule of standing, and that the Court has not neglected the language in the Fourth Amendment concerning "papers, and effects." *See* United States v. Groner, 5 Cir. 1974, 494 F.2d 499, cert. denied, —— U.S. ——, 95 S.Ct. ——, 41 L.Ed.2d ——. *Brown* concisely states the rule of standing in Fourth Amendment cases: defendants must demonstrate a "legitimate interest" of some kind in the premises searched or the objects seized. That interest may or may not be founded on some common law proprietary interest; the decisive factor in determining whether a search or seizure is "reasonable" for Fourth Amendment purposes is whether the complaining party's reasonable expectations of privacy have been unreasonably disturbed.

IV

Defendants here were not present at the search in question, nor are they charged with a possessory offense, so that they cannot claim either of those bases for standing. Rather defendants contend that they may contest the search on three other grounds: 1) their possessory interest in the seized tape recorders and tapes; 2) their agency relationship with McCann and Kelly; and 3) the prohibitions of the Texas search and seizure statute, coupled with the federal policy giving full effectuation to state exclusionary rules. We will examine these contentions in turn.

Defendants claim that their proprietary interest in the tape recorders and tapes is sufficient to bring them within the well-established rule conferring standing upon individuals having a possessory interest in the place or object searched or seized. Because their bill from Everett included the cost of every item seized, defendants claim title to every tape recorder and tape used in the operation. They point to the testimony of McCann and Everett at the suppression hearing below, to the effect that the equipment "belonged to the Hunts," as irrefutable evidence of their possessory interest in the electronic surveillance equipment. Finally, defendants rely on our recent decision in United States v. Banks, *supra*, for the proposition that legal title to an object always conveys standing to complain of a search thereof.

The first major difficulty with defendants' argument is that their claim of ownership is a very tenuous one. The record demonstrates that Everett and McCann occupied a contractual position in relation to the Hunts that is very close to the common law notion of an "independent contractor."[10] Defendants contacted Everett about doing a

[10] For an exposition of the conflicting and confusing development of independent contractor law, *see* Comment, "Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule," 1973, 40 U.Chi.L.Rev. 661.

job for them; Everett consulted McCann, who determined how the job could best be completed and how much it would cost; the defendants agreed to the price proposed by Everett, and had no more to do with the operation until they paid the bill. Everett had already retained Kelly as an employee of his detective agency; McCann hired Watson as a specialist. McCann and Kelly purchased every item of equipment with their own financial resources, paid for every rental car, every motel room, every meal with their funds, and were reimbursed by Everett upon completion of the project. Defendants never saw any of the equipment, either during or after the operation, except for certain master tapes, none of which were taken in the disputed search and seizure.

Whether an individual is a servant or an independent contractor depends upon whether the employer has a right to control the details of the work, Strangi v. United States, 5 Cir. 1954, 211 F.2d 305; Newspapers, Inc. v. Love, Tex. 1964, 380 S.W.2d 582, and the record does not show that the defendants at any time had any desire to interfere or could have interfered with the operation as planned by McCann and Everett and enacted by McCann, Kelly and Watson. The nature of the contractual relationship between Everett and McCann on the one hand and defendants on the other, makes defendants' claim to ownership of the tape recorders and tapes a diaphanous one at best.

Whatever title defendants may possess in the disputed evidence, we cannot help but reflect that this discussion of master and servant law and legal title has taken us very far from the substance of Fourth Amendment rights. As we have indicated above, the constitutional right of protection against unreasonable searches and seizures attaches only when an individual's reasonable expectation of privacy is shattered by illegal Government intrusion. Whatever minimal possessory interest defendants may have in the seized equipment, we have been unable to discern the

slightest privacy interest that defendants could reasonably assert in objects which they have never seen and of whose particular existence they were unaware until after the disputed search and seizure. If *Jones, Katz, Alderman* and *Brown* teach us anything, they indicate that common law notions about proprietary relations offer no *per se* rules in search and seizure cases; a naked assertion of possessory interest may be indicative but cannot be dispositive of the existence of a cognizable privacy interest in the place or thing searched. In the absence of a demonstrable expectation of privacy in the tape recorders and tapes, defendants can have no standing to protest the search and seizure. They may not vicariously assert the Fourth Amendment rights of McCann and Kelly.

There is nothing in our *Banks* case which confers standing upon defendants. In that case, Adams, Banks, Moody and George operated a counterfeiting ring. Banks purchased the printing press and certain other equipment; Moody furnished a garage to house the press; Adams, Banks and George operated the press; George distributed the counterfeit currency; Adams, Banks and George took equal shares of the proceeds. George was apprehended in the act of distributing some of his artwork, and gave information that led to the issuance of a warrant to search Moody's garage, which search led to the discovery of the press, the arrest of Adams and Banks, and the claim of the latter two individuals that the warrant was unconstitutionally defective. We held that Adams had no standing to object to the search, because he was not present at the time of the search and had no possessory interest either in Moody's garage or in the printing press. On the other hand, we found that Banks certainly had standing to object to the seizure of a press which he had purchased directly with his own funds (for which he had not been reimbursed by his partners in crime) and which he had operated in the course of the common criminal scheme. There was in

Banks no dispute as to the full measure of Banks' title to the press, nor any controversy as to his direct and enduring relationship to the machine. In short, there was in *Banks* that affirmative showing of reasonable expectation of privacy in the seized equipment that is so lacking here.

A case which is much more analogous to the present controversy than *Banks* is United States v. Johnson, 5 Cir. 1972, 456 F.2d 295. In *Johnson,* defendant had paid one Langner $450 to travel to Mexico, purchase marijuana from a pre-arranged contact and return the marijuana to him in the United States. Langner was stopped on his return to this country, the marijuana discovered and seized, and Johnson arrested. We found that Johnson had no standing to challenge the search for want of a sufficient privacy interest in the marijuana; he was not the individual at whom the search was aimed. Johnson's possessory interest in the seized marijuana was arguably greater than that of defendants here in the disputed electronic equipment because Johnson had arranged all the details of the operation and expected to receive the marijuana upon Langner's safe return; none of these things can be said about defendants in this case.

Defendants also argue that they must be awarded standing of the *Jones* variety in order to prevent the Government from contending on the one hand that defendants are responsible as principals for the violations by their agents McCann and Kelly of the federal wiretapping statute, while avowing on the other hand that this same principal-agent relationship does not suffice to confer standing upon defendants to contest a search of their agent Kelly's auto and electronic equipment. There is no merit in this argument.

This is not a case, as *Jones* was, where the Government's contradictory allegations create a cruel dilemma whereby

a defendant accused of a possessory offense must either incriminate himself at the suppression hearing or waive his opportunity to have illegally-obtained evidence suppressed. Defendants here are placed in no such dilemma by unfair prosecutorial tactics. There is in fact nothing contradictory about the United States' argument in this case; a principal-agent relationship sufficient to imply culpability may certainly fall short of conferring standing for Fourth Amendment purposes. Defendants' contention flies directly in the face of *Alderman*, where the Supreme Court held that co-defendants and co-conspirators do not possess standing to object to searches of their compatriots solely on the basis of their criminal relation.

Although there may well be cases in which a principal may object to a search of his agent's papers or effects, this is not one of them. Fifteen years of Supreme Court decisions stand squarely in the way of defendants' attempt to create a rule of *per se* standing for parties in a principal-agent relationship. This claim of privacy by agency is just the sort of vicarious assertion of Fourth Amendment rights that *Alderman* and *Brown* forbid. If we were to adopt the position urged by defendants, any criminally-inclined individual could earn a double dividend by hiring private investigators to complete his schemes: not only could the principal disassociate himself from any physical unpleasantness or risk involved in the criminal activity and at the same time cover his own tracks, but he could claim a privacy interest in any instrumentalities of the crime, no matter whether he had the slightest idea of the existence of such instrumentalities before the unpleasant epiphany of arrest.

Finally, defendants claim standing by virtue of Texas law and the Supreme Court's decision in Elkins v. United States, 1960, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669, to forbid federal courts to utilize evidence which would be excluded in state courts by operation of a state exclusion-

ary rule. Article 38.23 of the Vernon's Ann. Texas Code of Criminal Procedure provides that:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. . . .

As defendants correctly point out, Article 38.23 is a broad state exclusionary rule. *See* Mapp v. Ohio, *supra*. Defendants argue that the disputed evidence here was illegally obtained, so that it would be inadmissible in Texas courts, and that the rule of *Elkins* forbids federal courts to admit evidence that state courts would thus exclude:

> [W]hen a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. . . . 364 U.S. at 221, 80 S.Ct. at 1446, 4 L.Ed.2d at 1680.

Defendants contend that Texas is so desirous of deterring its law enforcement officers from making illegal searches and seizures that Article 38.23 minmizes, if not eschews, standing requirements in state cases. From this premise, defendants conclude that *Elkins* prevents federal courts from requiring standing in Texas search and seizure cases where, as here, Texas officers are involved.

Defendants cite us no Texas cases in support of their novel proposition, and with good reason: Texas law requires standing in search and seizure matters, and this state requirement differs in no material respect from the federal law of standing as outlined above. Stiggers v. State,

Tex.Cr.App. 1974, 506 S.W.2d 609; Clemons v. State, Tex. Cr.App. 1973, 501 S.W.2d 92; Booth v. State, Tex.Cr.App. 1973, 499 S.W.2d 129. Texas law confers no standing upon defendants here.

We have carefully examined the record and considered the defendants' various arguments. Neither the one nor the others convince us that defendants enjoyed a reasonable expectation of privacy in the disputed evidence. Under the rule of *Johnson*, and of *Jones, Katz, Alderman* and *Brown*, the Hunts cannot be said to be "aggrieved" by the searches of Kelly's automobile and the tapes; neither search was in any way directed at the defendants. To hold otherwise would stand these precedents on their heads. Fourth Amendment guarantees partake of a privateness which is not subject to barter or bailment. There is no standing room for persons positioned as defendants under the Fourth Amendment as elucidated in the exegesis of our judicial forebearers.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 74-1142

D. C. Docket No. CR 5-485

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

NELSON BUNKER HUNT AND W. HERBERT HUNT,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before RIVES, GEWIN AND GOLDBERG, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREFORE, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

December 23, 1974

Issued as Mandate:

18 U.S.C. § 3731

CHAPTER 235—APPEAL

§ 3731. Appeal by United States.

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

As amended Jan. 2, 1971, Pub.L. 91-644, Title III, § 14(a), 84 Stat. 1890.

18 U.S.C. § 2511

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication knowing or having reason to know that the information was obtained through the interception of

a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1052

NELSON BUNKER HUNT AND
W. HERBERT HUNT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they have standing to challenge the lawfulness of a search and seizure of a tape recording from the custody of an employee of a private detective agency that they had hired, and that the court of appeals lacked jurisdiction because the government filed its notice of appeal two months after the original district court order of suppression (but 28 days after the denial of its motion for reconsideration).

A six-count indictment returned in the United States District Court for the Northern District of Texas charged petitioners with unlawfully intercepting and endeavoring to intercept private telephone conversations, in violation of 18 U.S.C. 2511(1)(a). Prior to trial, petitioners moved to suppress certain tape recordings obtained by local police officers from an employee of a private investiga-

tive agency that petitioners had retained. Following two evidentiary hearings, the district court ordered the recordings suppressed (Pet. App. 1a-19a; 366 F. Supp. 172) and denied the government's motion for reconsideration (Pet. App. 21a). The court of appeals denied petitioners' motion to dismiss the appeal (Pet. App. 23a) and reversed and remanded (Pet. App. 24a-45a; 505 F.2d 931).

The facts are set forth in the opinions of the lower courts and in a related decision, *United States* v. *McCann*, 465 F.2d 147 (C.A. 5), certiorari denied, 412 U.S. 927. In late October or early November 1969, petitioners retained a Houston, Texas, private investigative agency owned by W.G. Everett to gather, by means of electronic surveillance, information concerning certain employees of a corporation controlled by petitioners' father. Before agreeing to the undertaking, Everett commissioned Patrick McCann, an electronics expert, to travel to Dallas, where the employees resided, to estimate the job requirements and costs, and to prepare a report. After reaching an agreement with petitioners, Everett placed McCann in charge of the surveillance operation (Pet App. 25a-26a).

McCann used equipment that he either purchased at retail stores or manufactured. The plan involved the installation of electronic interception devices on telephone wires. Receivers were concealed in various rental automobiles parked on a rotating basis outside the target homes. Telephone conversations recorded on the equipment in the vehicles were thereafter re-recorded onto master tapes, after extraneous interceptions were edited out (Pet. App. 26a).

From December 1969 through mid-January 1970, McCann and an Everett employee, Jon Joseph Kelly, conducted electronic surveillance activities in Dallas and elsewhere. During this period McCann returned to

Houston and Everett presented petitioners with a bill for the expenses incurred by McCann, Kelly, and a third assistant, Watson, and for their services thus far. Petitioners paid the bill and received the edited master tapes; Everett in turn paid McCann, Kelly, and Watson. McCann returned to Dallas, where he, Kelly, and Watson continued their surveillance (Pet. App. 26a-27a).

One of the telephones they tapped was in the home of Mr. and Mrs. Paul Rothermal in Richardson, Texas, a Dallas suburb. On January 9, 1970, a neighbor of the Rothermals telephoned the Richardson police about a vehicle parked overnight near her home. The neighbor told the police that neither she nor other residents knew to whom the car belonged. During the next few days the police learned that the car in question and other rental automobiles had been routinely parked in the neighborhood and left unattended for a day or two before being replaced, and that the persons who rented the cars had listed hotels as their local addresses and fictitious addresses in Houston as their permanent residences. Observing that inside each of the cars was an identical pile of newspapers on the right front floorboard, the police officers believed that the cars were being used as part of a narcotics operation, a scheme to burglarize residents, or a matrimonial investigation by private detectives (Pet. App. 27a).

On January 15, 1970, a neighbor reported to the police that a station wagon had been parked on the street near the Rothermal home the previous day until 12:15 a.m., when two people drove it away. Later that day, neighbors reported that a Mustang automobile was parked on the street. On the morning of January 16, police officers examined the Mustang, saw newspapers inside apparently concealing something, and decided to remain in the area to keep watch. At 5:10 p.m. Kelly arrived, entered the Mustang, and drove away. The police officers stopped him shortly thereafter, and he refused to identify

who brought him to the place where he picked up the Mustang. The investigating officer opened the door of the Mustang and found a briefcase under the newspapers. Kelly stated that he had no idea what was inside. The officer then opened the briefcase and discovered a radio, a tape recorder, a tape, and other electronic devices wired to the car's antenna.

The officers arrested Kelly and took him and the car to the station house. There they played the tape and then notified the FBI. An FBI agent listened to the tape and identified two of the voices as those of Mr. and Mrs. Rothermal. Further investigation led to the indictment and conviction of McCann and Kelly on federal wiretap charges and to the indictment of petitioners (Pet. App. 27a).

1. Petitioners seek to challenge the lawfulness of the police officers' seizure of the briefcase from Kelly and of their playing of the tape at the station house. The court of appeals correctly held, however, that petitioners lack standing to object to the search and seizure because the officers' conduct, whether lawful or unlawful, implicated no protected Fourth Amendment interest of petitioners. As this Court stated in *Jones* v. *United States*, 362 U.S. 257, 261: "In order to qualify as a 'person aggrieved by an unlawful search and seizure' [Fed. R. Crim. P. 41(e)] one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." The search and seizure here were directed against Kelly, not petitioners, and petitioners cannot vicariously assert Kelly's rights. *Alderman* v. *United States*, 394 U.S. 165, 174.

Petitioners contend, however, that they have standing to object to the seizure of the tape and the playing of it, because they were the owners of the tape. Agreeing that a legitimate proprietary interest in the things seized will ordinarily confer standing upon the owner to challenge the lawfulness of the seizure (see Pet. App. 35a), the court of appeals correctly held that petitioners' "very tenuous" claim of ownership here did not amount to the kind of interest that the Fourth Amendment is intended to protect (Pet. App. 39a-40a).

Petitioners rest their claim of ownership solely upon their payment of Everett's bill for services rendered and for reimbursement of the out-of-pocket expenses of McCann, Kelly, and Watson for auto rental fees, food, lodging, and equipment, including the tape seized by the police from Kelly. As the court of appeals stated, "[t]he nature of the contractual relationship between Everett and McCann on the one hand and defendants on the other, makes defendants' claim to ownership of the tape recorders and tapes a diaphanous one at best" (Pet. App. 40a). "Defendants never saw any of the equipment, either during or after the operation, except for certain master tapes, none of which were taken in the disputed search and seizure" (*ibid.*).[1]

The court correctly concluded, in light of the circumstances of this case, that petitioners' assertion of bare title to the tapes, even if valid, gave them no reasonable expectation of privacy that could have been invaded by the police officers' conduct (Pet. App. 40a-41a):

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[1]Moreover, since the tape had been used in violation of 18 U.S.C. 2511, it was subject to seizure and forfeiture pursuant to 18 U.S.C. 2513. Any proprietary interest petitioners may have had in the tape was consequently an illegitimate one.

> Whatever minimal possessory interest defendants may have in the seized equiment, we have been unable to discern the slightest privacy interest that defendants could reasonably assert in objects which they have never seen and of whose particular existence they were unaware until after the disputed search and seizure. * * * [A] naked assertion of possessory interest may be indicative but cannot be dispositive of the existence of a cognizable privacy interest in the place or thing searched. In the absence of a demonstrable expectation of privacy in the tape recorders and tapes, defendants can have no standing to protest the search and seizure.

Petitioners contend (Pet. 26-29) that they were entitled to "automatic standing" under *Jones* v. *United States, supra*. Whatever vitality the automatic standing rule may retain in the wake of *Simmons* v. *United States*, 390 U.S. 377—which eliminated "[t]he self-incrimination dilemma, so central to the *Jones* decision" (*Brown* v. *United States*, 411 U.S. 223, 228)—the rule has always been limited to cases in which "possession of the seized evidence is itself an essential element of the offense * * * charged." *Simmons* v. *United States, supra*, 390 U.S. at 390.

Petitioners contend that "possession of the knowledge of a communication" (Pet. 27) is an essential element of the offense of intercepting a wire communication in violation of 18 U.S.C. 2511(1)(a). But even if that strained effort to characterize an unlawful wire interception as a possessory offense were accepted, the evidence in this case showed that the private investigators, rather than petitioners, actually performed the interceptions; petitioners procured the investigators to conduct the illegal activity and were guilty of the offense in that

capacity. If anyone "possess[ed] * * * the knowledge of a communication" (Pet. 27), it was the investigators, not petitioners.[2]

2. Petitioners contend (Pet. 30-31) that the court of appeals lacked jurisdiction because the time for the government's appeal ran from the district court's order granting the motion to suppress, rather than from the order denying reconsideration. The contention is answered by this Court's decision in *United States* v. *Healy*, 376 U.S. 75, which held that the time for filing a notice of appeal is measured from the denial of the motion for reconsideration rather than from the date of the original judgment. Applying that standard, the government's notice of appeal was timely filed. Rule 4(b), Fed. R. App. P. That "the burdens on the Federal Judiciary have greatly increased in the ten years since *Healy* was decided" (Pet. 31) is no reason to reconsider the sound principles upon which that decision rests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[2]If petitioners had had no connection with the interception but were merely found in actual possession of the tape, they could not have been charged with violation of 18 U.S.C. 2511.